judgment no 9, 1974

9

IN THE PRIVY COUNCIL

No. 13 of 1973

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :-

DUNCAN HOLDEN — Appellant

-and-

COMMISSIONER OF INLAND REVENUE — Respondent

AND BETWEEN :-

MAURICE CAMPBELL MENNEER — Appellant

-and-

COMMISSIONER OF INLAND REVENUE — Respondent

RECORD OF PROCEEDINGS

WRAY, SMITH & CO.,
1, King's Bench Walk,
Temple, LONDON, EC4Y 7DD.
Solicitors for the
Appellants.

ALLEN & OVERY,
9, Cheapside,
LONDON, EC2V 6AD.
Solicitors for the
Respondent.

IN THE PRIVY COUNCIL — No. 13 of 1973

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :-

DUNCAN HOLDEN — Appellant

-and-

COMMISSIONER OF INLAND REVENUE — Respondent

AND BETWEEN :-

MAURICE CAMPBELL MENNEER — Appellant

-and-

COMMISSIONER OF INLAND REVENUE — Respondent

RECORD OF PROCEEDINGS

PART I - INDEX OF REFERENCE

PART II - EXHIBITS

LIST OF DOCUMENTS OMITTED FROM THE RECORD

1. Agreed Statement of Facts; this is included in full in the reasons for judgment of Haslam J. at p. 61 of the Record.

2. Notice of Motion for conditional leave to appeal to Her Majesty in Council (Holden v. C.I.R.)

3. Notice of Motion for conditional leave to appeal to Her Majesty in Council (Menneer v. C.I.R.)

4. Notice of Motion for final leave to appeal to Her Majesty in Council (Holden v. C.I.R.)

5. Notice of Motion for final leave to appeal to Her Majesty in Council (Menneer v. C.I.R.)

6. Affidavit of John Renwick Harkness in support of Motions for final leave to appeal to Her Majesty in Council.

IN THE PRIVY COUNCIL — No. 13 of 1973

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :-

DUNCAN HOLDEN — Appellant

- and -

COMMISSIONER OF INLAND REVENUE — Respondent

AND BETWEEN :-

MAURICE CAMPBELL MENNEER — Appellant

- and -

COMMISSIONER OF INLAND REVENUE — Respondent

RECORD OF PROCEEDINGS

No. 1

In the Supreme Court of New Zealand

No. 1

Case Stated 18th September 1971

CASE STATED (HOLDEN V. COMMISSIONER OF INLAND REVENUE)

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

BETWEEN DUNCAN HOLDEN of Havelock North, Farmer — OBJECTOR

A N D THE COMMISSIONER OF INLAND REVENUE — COMMISSIONER

C A S E S T A T E D

pursuant to section 32 of the Land and Income Tax Act 1954.

1. AT all material times the Objector resided at Havelock North where he carried on the business of farmer.

In the Supreme Court of New Zealand

No. 1

Case Stated

18th September 1971 (continued)

2. THE balance date of the Objector is the 30th day of June and the Commissioner accepts a return of income for any year ending on the 30th day of June as being in respect of the year ended on the previous 31st day of March.

3. IN furnishing returns of income to the Commissioner it was declared on behalf of the Objector that the incomes derived by him during the years ended on the 30th day of June 1965 and 1966 were as follows:-

Year Ended 30 June 1965

Assessable Income £1,812. 1. 7.

Year Ended 30 June 1966 £6,246.14.10.

The incomes returned included dividends derived in Australia from shares in certain Australian companies and in each case the dividend was converted in the accounts of the Objector into New Zealand currency at the official rate current at the time.

4. SUBSEQUENTLY the Commissioner ascertained that during the years ended on the 30th day of June 1965 and 1966 the Objector purchased overseas securities with overseas currency and shortly thereafter sold the said securities in New Zealand for New Zealand currency. Details of such transactions are as follows:

Year Ended 30 June 1965

Date	Purchase Price (Sterling)	Selling Price (N.Z.)	Difference between Purchase Price and Selling Pri at Official Rate
18.5.65 Bought £596.15.0 6% Conversion Loan Stock 1972	£596.15. 0		
Carried fwd.	£596.15. 0		

Date	Purchase Price (Sterling)	Selling Price (N.Z.)	Difference between Purchase Price and Selling Price at Official Rate
B/F	£596.15. 0		
18.5.65 Sold £ £596.15.0 6% Conversion Loan Stock 1972		£668. 7. 6	£ 71.12. 6
18.5.65 Bought £4,000 6% Conversion Loan Stock 1972	£4020. 0. 0		
18.5.65 Sold £4000 6% Conversion Loan Stock 1972		£4500. 0. 0	£480. 0. 0
	£4616.15. 0	£5168. 7. 6	£551.12. 6

Year Ended 30 June 1966

Date	Purchase Price (Sterling)	Selling Price (N.Z.)	Difference between Purchase Price and Selling Price at Official Rate
19.7.65 Bought £5810.19. 0 5% Exchequer Stock 1967	£5840. 0. 0		
19.7.65 Sold £5810.19. 0 5% Excheque Stock 1967		£6595. 8. 6	£755. 8. 6
20.7.65 Bought £995. 0. 6 5% Excheque Stock 1967	£1000. 0. 0.		
Carried forward	£6840. 0. 0	£6595. 8. 6	£755. 8. 6

In the Supreme Court of New Zealand

No. 1

Case Stated

18th September 1971 (continued)

Date	Purchase Price (Sterling)	Selling Price (N.Z.)	Difference between Purchase Price and Selling Price at Official Rate
Brought forward	£6840. 0. 0	£6595. 8. 6	£755. 8. 6
20.7.65 Sold £995.0.6 5% Exchequer Stock 1967		£1129. 7. 0	£129. 7. 0
20.7.65 Bought £4000 5% Exchequer Stock 1967	£4020. 0. 0		
20.7.65 Sold £4000 5% Exchequer Stock 1967		£4540. 0. 0	£520. 0. 0
23.7.65 Bought £602 5% Exchequer Stock 1967	£602. 0. 0		
23.7.65 Sold £602 5% Exchequer Stock 1967		£ 681. 0. 0	£ 79. 0. 0
5.8.65 Bought £10945.5.6. 5% Exchequer Stock 1967	£11000. 0. 0		
5.8.65 Sold £10945.5.6. 5% Exchequer Stock 1967		£12447.12. 3	£1477.12. 3
9.8.65 Bought £206. 2. 6. 5% Exchequer Stock 1967	£206. 2. 6		
Carried forward	22668. 2. 6	25393. 7. 9	2961. 7. 9

Date	Purchase Price (Sterling)	Selling Price (N.Z.)	Difference between Purchase Price and Selling Price at Official Rate
Brought forward	22668. 2. 6	25393. 7. 9	2961. 7. 9
9.8.65 Sold £206. 2. 6 5% Exchequer Stock 1967		£233.19. 0	£27.16. 6
22.4.66 Bought £500 6½% Exchequer Stock 1969	£500. 0. 0		
22.4.66 Sold £500 6½% Exchequer Stock 1969		£537. 3. 2	£37. 3. 2
15.6.66 Bought £1500 6½% Exchequer Stock 1969	£1500. 0. 0		
15.6.66 Sold £1500 6½% Exchequer Stock 1969		£1643. 3. 0	£143. 3. 0
	£24668. 2.6	£27837.12.11	£3169.10. 5

Certified copies of the Objector's sharebrokers ledger cards in respect of the above transactions to the 9th day of August 1965 inclusive are annexed hereto and marked "A". Certified copies of the Objector's sharebrokers contract notes in respect of the Objector's last two transactions are annexed hereto and marked "A1". The overseas securities referred to were in the nature of bearer stock ownership of which passed by delivery and the parcels of securities bought and sold were never identifiable by descriptive numbers.

5. THE Commissioner considered that the said profits of £551.12. 6 and £3169.10. 5 referred to in the

In the Supreme Court of New Zealand

No. 1

Case Stated 18th September 1971 (continued)

(c) The business of the Objector does not, nor did it at any material time include dealing in any personal property, and, in particular, does not nor did it at any material time comprise dealing in stocks or securities;

(d) That none of the stock or securities referred to in such amended assessments, and no property of any kind, was acquired by the Objector for the purpose of selling or otherwise disposing of it;

(e) No profits or gains were derived by the Objector from the carrying on, or the carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit, with respect to stock or securities or otherwise;

(f) The transfer by the Objector of assets in the United Kingdom to New Zealand did not yield any profit or gain to the Objector within the meaning of s.88 of the Land and Income Tax Act 1954 or otherwise.

12. THE Commissioner contends -

(1) That the sums referred to in paragraph 9 hereof as "profit on sale of overseas securities" constituted assessable income of the Objector for the respective years in question under section 88(1)(c) of the Land and Income Tax Act 1954 and, in particular, constituted

(i) profits or gains derived from the sale of personal property which was acquired for the purpose of selling it, and

(ii) profits or gains derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit;

(2) that such sums constituted assessable income of the Objector under section 88(1)(g) of the said Act;

(3) that such sums constituted assessable income of the Objector according to ordinary concepts.

Date	Purchase Price (Sterling)	Selling Price (N.Z.)	Difference between Purchase Price and Selling Price at Official Rate
Brought forward	22668. 2. 6	25393. 7. 9	2961. 7. 9
9.8.65 Sold £206. 2. 6 5% Exchequer Stock 1967		£233.19. 0	£27.16. 6
22.4.66 Bought £500 6½% Exchequer Stock 1969	£500. 0. 0		
22.4.66 Sold £500 6½% Exchequer Stock 1969		£537. 3. 2	£37. 3. 2
15.6.66 Bought £1500 6½% Exchequer Stock 1969	£1500. 0. 0		
15.6.66 Sold £1500 6½% Exchequer Stock 1969		£1643. 3. 0	£143. 3. 0
	£24668. 2.6	£27837.12.11	£3169.10. 5

Certified copies of the Objector's sharebrokers ledger cards in respect of the above transactions to the 9th day of August 1965 inclusive are annexed hereto and marked "A". Certified copies of the Objector's sharebrokers contract notes in respect of the Objector's last two transactions are annexed hereto and marked "A1". The overseas securities referred to were in the nature of bearer stock ownership of which passed by delivery and the parcels of securities bought and sold were never identifiable by descriptive numbers.

5. THE Commissioner considered that the said profits of £551.12. 6 and £3169.10. 5 referred to in the

In the Supreme Court of New Zealand

No. 1

Case Stated 18th September 1971 (continued)

previous paragraph hereof were assessable income of the Objector. Accordingly the Commissioner made amended assessments of the amounts on which in his judgment income tax ought to be levied on the Objector in respect of the years ended on the 30th day of June 1965 and 1966 respectively and the amounts of such tax for those years as follows:

Year Ended 30th June 1965

Assessable income returned	£1812. 1. 7
Add profit on sale of overseas securities	551.12. 6
	£2363.14. 1
Income Tax	£583. 7. 0

Year Ended 30th June 1966

Assessable income returned	£6246.14.10
Add profit on sale of overseas securities	£3169.10. 5
	£9416. 5. 3
Income Tax	£4938. 4. 0

6. THE Objector objected to the assessments referred to in the previous paragraph hereof on the grounds set forth in his solicitors' letter dated the 2nd day of December 1969. A copy of such letter is annexed hereto and marked "B".

7. UPON such objection being disallowed the Commissioner was required to state this case.

8. SUBSEQUENTLY the Commissioner recalculated the said profits from the sale of overseas securities referred to in paragraphs 4 and 5 hereof and in doing so used the then prevailing official buying rate of £STG 100.0.0 = £NZ 100.7.6. Details of such calculations are as follows:

Year Ended 30 June 1965

Purchase Price (Sterling)	Telegraphic Transfer Buying Rate (N.Z.)	Selling Price (N.Z.)	Difference between Purchase Price and Selling Price at Official Rate
£4616.15. 0	£4634. 1. 3	£5168. 7.6	£534. 6. 3

Year Ended 30 June 1966

Purchase Price	Telegraphic Transfer Buying Rate (N.Z.)	Selling Price (N.Z.)	Difference between Purchase Price and Selling Price at Official Rate
£24668. 2.6	£24760.12.7	£27837.12.11	£3077. 0. 4

9. ACCORDINGLY on the 28th day of July 1970 the Commissioner made amended assessments of the amounts on which in his judgment income tax ought to be levied on the Objector in respect of the years ended on the 30th day of June 1965 and 1966 respectively and the amounts of such tax for those years as follows:

Year Ended 30 June 1965

Assessable income returned	£1812. 1. 7
Add profit on sale of overseas securities	534. 6. 3
	£2346. 7.10
Income Tax	£576.10. 1

Year Ended 30 June 1966

Assessable income returned	£6246.14.10
Add profit on sale of overseas securities	3077. 0. 4
	£9323.15. 2
Income Tax	£4875. 9. 3

10. THE Objector restated his objection to the amended assessments referred to in the previous paragraph hereof by letter from his solicitors dated the 11th day of August 1970. A copy of such letter is annexed hereto and marked "C". Such objection was disallowed and the Commissioner was required to state this case.

11. THE Objector contends -

(a) That neither the sum of £534. 6. 3d nor any part thereof included in the amended assessment for the year ended 30 June 1965 is income;

(b) That neither the sum of £3077. 0. 4d. nor any part thereof included in the amended assessment for the year ended 30 June 1966 is income;

In the Supreme Court of New Zealand

No. 1

Case Stated 18th September 1971 (continued)

(c) The business of the Objector does not, nor did it at any material time include dealing in any personal property, and, in particular, does not nor did it at any material time comprise dealing in stocks or securities;

(d) That none of the stock or securities referred to in such amended assessments, and no property of any kind, was acquired by the Objector for the purpose of selling or otherwise disposing of it;

(e) No profits or gains were derived by the Objector from the carrying on, or the carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit, with respect to stock or securities or otherwise;

(f) The transfer by the Objector of assets in the United Kingdom to New Zealand did not yield any profit or gain to the Objector within the meaning of s.88 of the Land and Income Tax Act 1954 or otherwise.

12. THE Commissioner contends -

(1) That the sums referred to in paragraph 9 hereof as "profit on sale of overseas securities" constituted assessable income of the Objector for the respective years in question under section 88(1)(c) of the Land and Income Tax Act 1954 and, in particular, constituted

(i) profits or gains derived from the sale of personal property which was acquired for the purpose of selling it, and

(ii) profits or gains derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit;

(2) that such sums constituted assessable income of the Objector under section 88(1)(g) of the said Act;

(3) that such sums constituted assessable income of the Objector according to ordinary concepts.

13. THE question for the determination of this Honourable Court is whether the Commissioner acted incorrectly in making the assessments referred to in paragraph 9 hereof and, if so, then in what respects should such assessments be amended.

DATED at Wellington this 18th day of September, 1971.

'T.M. Hunt'

Chief Deputy Commissioner
of Inland Revenue

In the Supreme Court of New Zealand

No. 1

Case Stated 18th September 1971 (continued)

In the Supreme Court of New Zealand

No. 2

'A' Share-brokers Ledger Cards

Date	Ref'nce	Particulars	Number of Units	Price	Debits	Credits	Balance	Proof
May 16 '65 RI	159	C/N. 56D06. 57109				4,616.15. 0.		
May 18 '65 ON	57,109	£596/15/0. 6% Conv.			596.15. 0.			
May 18 '65 ON	57,106	£4020. 6% Conv. Loan 72		100. 0.0.	4,020. 0. 0.			567.1
Jul 19 '65 ON	60,316	£5810/15/0 5% Exchequer 1967		100. 0.0.	5,840. 0. 0.			
Jul 20 '65 ON	60,361	£995/0/6 5% Exch. 1967		100. 0.0.	1,000. 0. 0.			
Jul 20 '65 ON	60,372	£4000 5% Exch. 1967		100. 0.0.	4,020. 0. 0.			
Jul 23 '65 ON	60,534	£602 5% Exch. 1967		100. 0.0.				
Jul 28 '65 RI	416	C/H. 6031 6				5,840. 0. 0.		
Jul 28 '65 RI	416	C/N. 60361				1,000. 0. 0.		
Jul 28 '65 RI	416	C/N. 60372				4,020. 0. 0.		
Jul 28 '65 RT	416	C/N. 60534				602. 0. 0.		
Jul 28 '65 RT	416	Balance				4,000.12. 6.	4,000.12. 6.	3,432.1
Aug 5 '65 ON	1,570	C/Note to follow			1,000. 0. 0.		3,000.12. 6.	2,432.1
Aug 5 '65 ON	61,069	£10945/5/6 5% Exchequer '67		100. 0.0.	11,000. 0. 0.		7,999. 7. 6.	8,567
Aug 6 '65 RI	463	Credit A/C £1000 £11206/2/6				12,206. 2. 6.	4,206.15. 0.	3,638.1
Aug 9 '65 ON	61,134	£206/2/6 5% Exch.1967		100. 0.0.	206. 2. 6.		4,000.12. 6.	3,432.1
Aug 18 '65 JL	8,862	Trans to Australian Currency			4,000.12. 6.			567.1
Feb 9 '68 ON	91,393	Rio Tinto Zinc	200	5. 1.9.	1,032.15. 3.		1,032.15. 3.	1,600.14
Mar 29 '68 JL	79	Balance of A/C Paid Aust.				1,032.15. 3.		567.1
May 18 '65 ON	57,110	£596/15/0 6% Conv. Loan 72		13. 0.0.		668. 7. 6.		
May 18 '65 ON	57,107	£4000 6% Conv. Loan 72		13. 0.0.		4,500. 0. 0.		
May 20 '65 ON	57,271	Gear Heat. Note Rights. Appn. Mon. £1000/0/0	2,000	2.6.	1,269.12. 6.			
May 20 '65 ON	57,252	N.Z. Prod. Ord.	500	1. 4.1.	613. 7. 8.			
May 20 '65 ON	57,246	U.E. Box Co. Ltd.	1,000	12.9.	649. 6. 9.			
May 27 '65 ON	57,680	Union Steam N.Z.Ltd.Pref.	1,000	19.6.	993. 2. 6.		1,642.18. 1.	1,074.1
May 19 '65	8,435	Premium C/N 57107	10		551.12. 6.		1,091. 5. 7.	523.6
Jul 2 '65	9,144	Appn. 1000 D. Holpe Shares N.Z. Sea Products			125. 0. 0.		966. 5. 7.	398.6
Jul 19 '65	60,317	£5810/19/0 5% Exch. 1967		114. 0.0.		6,595. 8. 6.	7,561.14. 1.	6,993.16
Jul 20 '65 ON	60,362	£995/0/6 5% Exch. 1967		114. 0.0.		1,129. 7. 0.		
Jul 20 '65 ON	60,371	£4000 5% Exch. 1967		114. 0.0.		4,540. 0. 0.	13,231. 1. 1.	12,663.2
Jul 23 '65 ON	60,535	£602 5% Exch. 1967		114. 2.6.		681. 0. 0.	13,912. 1. 1.	13,344.2
Jul 28 '65	9,347	Debit A/C			10,912. 1. 1.		3,000. 0. 0.	2,432.1
Jul 29 '65	9,092	A.G.C. (N.Z.)Ltd. No.2 A/C			2,000. 0. 0.		1,000. 0. 0.	432.1
Aug 5 '65	61,070	£10945/5/6 5% Exch. 1967		114.10.0.		12,477.12. 3.	13,477.12. 3	12,909.13
Aug 9 '65 ON	61,137	£206/2/6 5% Exch. 1967		114.10.0.		233.19. 0.	13,711.11. 3.	31,431.12
Aug 10 '65	5,770	Exemptions from Taxation Re Gvt. Stock. (A.G.Little)			4. 4.0.			
Aug 10 '65 ON	5,777	C/N. 61070. C/N. 61,135 Less C/N 61069			1,711.11. 3.		11,995.16. 0.	11,427.17
Aug 10 '65 ON	61,192	U.E. Box Co. Ltd.	100	12.6.	63.15. 9.			
Aug 10 '65 ON	61,158	U.E. Box Co. Ltd.	1,000	12.6.	636.13. 0.			
Aug 10 '65	61,160	Sth. Brit. Insurance	400	1.10.1.	612.19. 4.			
Aug 10 '65 ON	61,164	Sth. Brit. Insurance	400	1.10.1.	612.19. 4.			
Aug 10 '65 ON	61,163	Sth. Brit. Insurance	700	1.10.1.	1,072.11. 1.		8,996.17. 6.	8,428.18
Aug 11 '65 ON	61,228	U.E. Box Co. Ltd.	300	12.6.	191. 0.7.			
Aug 11 '65	61,230	U.E. Box Co. Ltd.	500	12.6.	318. 8. 3.			
Aug 11 '65	61,271	N.Z. For Prod. Ltd.	1,500	1. 4.0.	1,833. 6. 0.		6,664. 3. 0.	6,086.4
Aug 12 '65	61,277	U.E. Box Co. Ltd.	100	12.7.	64. 4. 1.		6,589.18.11.	6,022.0
Aug 19 '65 ON	61,566	Sth. British Insur.	100	1. 9.9.	151.10. 3.			
Aug 19 '65	61, 567.	Sth. British Insur.	100	1. 9.9.	151.10. 3		6, 135.8.2.	5.667.9.
Aug 14 '65 ON	61. 597.	Sth. British Insur.	100.	1.9.9.	151.10. 3.			
Aug 14 '65 ON	5, 923	British Petroleum			5, 000.00.		1, 135.8.2.	567.9.5.

In the Supreme Court of New Zealand

No. 3(a)

'A1' Share-brokers Contract Notes (A No 1008 Bought)

No. 3(a)

"A1" SHAREBROKERS' CONTRACT NOTES
No. 1008 (Bought)

"A1"

CERTIFIED COPY

WISHART AND CASELEY
Stock & Share Brokers
121 Queen Street E., Hastings
FOR PROMPT DELIVERY PLEASE ADDRESS TO P.O.BOX 13 1046

Code Address
"WISCAS"

T. I. CASELEY
Country Member
Wellington
Stock Exchange

Telephones
Office: 85 085

Private -
Mr.Caseley
HMN-864
Mr.Wishart
83 371

Bought Messrs Hamilton, Nathan & Sclanders,
From P.O. Box 1407, WELLINGTON.

6½% Exchequer Stock 1969		
499.13.9 Stock @ 100.1.3 Stg.	500	00
Stamp Duty		
Allowance	12.	6
Brokerage		
	£ 12.	6

CONTRACT NOTE
No. 1008
22 April 1966

WISHART and CASELEY
(Sgd.) T.I. Caseley
Brokers

Subject to the Rules and Regulations of the Wellington Stock Exchange

In the Supreme Court of New Zealand

No. 3(b)

"Al" Share-brokers Contract Notes (continued)

(B.No 1008 - Sold)

No. 3(b)

No. 1008 (Sold)

"Al"

CERTIFIED COPY

WISHART AND CASELEY
Stock and Share Brokers
121 Queen Street E., Hastings

Code Address "WISCAS"

T.I. CASELEY
Country Member Wellington Stock Exchange

FOR PROMPT DELIVERY PLEASE ADDRESS TO P.O. BOX 13 1046

Sold Mr. D. Holden,
To P.O. Box 47, HAVELOCK NORTH.

Telephones Office: 85 085

Private - Mr.Caseley HWN-864
Mr.Wishart 83 371

6½% Exchequer Stock		
499.13.9 Stock @ 100.1.3 Stg.	500	00
Stamp Duty		
Allowance		
Brokerage 10/-%	2	10
	2	10

CONTRACT NOTE
No. 1008

22 April 1966

WISHART and CASELEY

(Sgd.) T.I. Caseley Brokers

Subject to the Rules and Regulations of the Wellington Stock Exchange

No. 3(c)

No. 1007 (Bought)

In the Supreme Court of New Zealand

No. 3(c)

"Al" Share-brokers Contract Notes (continued)

(C. No.1007 - Bought)

CERTIFIED COPY
WISHART AND CASELEY
Stock & Share Brokers
121 Queen Street E., Hastings

Code Address
"WISCAS"

T.I. CASELEY
Country Member
Wellington
Stock Exchange

FOR PROMPT DELIVERY PLEASE ADDRESS TO P.O. BOX 13 1046

Telephones:
Office: 85 085

Private -
Mr.Caseley
HMN-864
Mr.Wishart
83 371

Bought Mr. D. Holden
From P.O. Box 47, HAVELOCK NORTH

CONTRACT NOTE
No. 1007
22 April 1966

6½% Exchequer Stock		
499.13.9 Stock @ 108¼	542. 3.2	
Stamp Duty		
Allowance		
Brokerage 10/-%	2.10.0	
	£	539.13.2

WISHART and CASELEY
(Sgd.) T.I. Caseley
Brokers

Subject to the Rules and Regulations of the Wellington Stock Exchange

No. 3(d)

No. 1007 (Sold) "A1"

CERTIFIED COPY

WISHART AND CASELEY
Stock & Share Brokers
121 Queen Street E., Hastings
FOR PROMPT DELIVERY PLEASE ADDRESS TO P.O. BOX 13 1046

Code Address
"WISCAS"

T.I. CASELEY
Country Member
Wellington
Stock Exchange

Telephones
Office: 85 085
Private -
Mr.Caseley
HMN-864
Mr.Wishart
83 371

CONTRACT NOTE
No. 1007

22 April 1966

Subject to the Rules and Regulations of the Wellington Stock Exchange

Sold To: Messrs Hamilton, Nathan & Sclanders
P.O. Box 1407, WELLINGTON.

6½% Exchequer Stock 1969		
499.13.9 Stock @ 108½	542.	3. 2
Stamp Duty		
Allowance		12. 6
Brokerage		
WISHART and CASELEY	£ 541.	10. 8

(Sgd.) T.I. Caseley Brokers

No. 3(e)

No. 1038 (Bought)

In the Supreme Court of New Zealand

No. 3(e)

"Al" Share-brokers Contract Notes (continued)

(E. No. 1038 - Bought)

"Al"

CERTIFIED COPY

WISHART AND CASELEY
Stock & Share Brokers
121 Queen Street E., Hastings
FOR PROMPT DELIVERY PLEASE ADDRESS TO P.O. BOX 13 1046

Code Address
"WISCAS"

T.I. CASELEY
Country Member
Wellington
Stock Exchange

Telephones
Office: 85 085
Private -
Mr.Caseley
HMN-864
Mr.Wishart
83 371

Bought Messrs. Hamilton,Nathan & Sclanders,
From P.O. Box 1407, WELLINGTON.

	6½% Exchequer Stock 1969	
1499.1.3	Stock @ 100.13 Stg.	1500 00
	Stamp Duty	
	Allowance	1.17.6
	Brokerage	
		£
		1.17.6

CONTRACT NOTE

No. 1038

15 June 1966

WISHART and CASELEY

(Sgd.) T.I. Caseley Brokers

Subject to the Rules and Regulations of the Wellington Stock Exchange

In the Supreme Court of New Zealand

No. 3(f)

"Al" Share-brokers Contract Notes (continued)

(F. No. 1038 - Sold)

No. 3 (f)

No. 1038 (Sold) "Al"

CERTIFIED COPY

WISHART AND CASELEY
Stock & Share Brokers
121 Queen Street E., Hastings
FOR PROMPT DELIVERY PLEASE ADDRESS TO P.O. BOX 13 1046

Code Address "WISCAS"
T.I. CASELEY
Country Member Wellington Stock Exchange

Telephones Office: 85 085

Private - Mr.Caseley HTN-864
Mr.Wishart 83 371

Sold Mr. D. Holden
To P.O. Box 47, HAVELOCK NORTH.

CONTRACT NOTE
No. 1038

15 June 1966

6½% Exchequer Stock 1969		
1499.1.3 Stock @ 100.1.3. Stg.	1500	00
Stamp Duty		
Allowance		
Brokerage 10/-%	7.10.0	
	£ 7.10.0	

WISHART and CASELEY

(Sgd.) T.I. Caseley Brokers

Subject to the Rules and Regulations of the Wellington Stock Exchange

No. 3(g)

No. 1037 (Bought)

In the Supreme Court of New Zealand

No. 3(g)

"A1" Share-brokers Contract Notes (continued)

(G. No. 1037 - Bought)

"A1"

CERTIFIED COPY

WISHART AND CASELEY
Stock & Share Brokers
121 Queen Street E., Hastings

Code Address
"WISCAS"

T.I. CASELEY
Country Member
Wellington
Stock Exchange

Telephones
Office: 85 085

Private -
Mr.Caseley
HTN-864
Mr.Wishart
83 371

FOR PROMPT DELIVERY PLEASE ADDRESS TO P.O. BOX 13 1046

Bought Mr. D. Holden
From P.O. Box 47, HAVELOCK NORTH.

CONTRACT NOTE

No. 1037

15 June 1966

6½% Exchequer Stock 1969		
1499.1.3 Stock @ 110¾	1660. 4. 3	
Exchange	2. 1. 3	
Stamp Duty		
Allowance		
Brokerage 10/-%	7.10. 0	
WISHART and CASELEY	℔	1650.13. 0

(Sgd.) T.I. Caseley Brokers

Subject to the Rules and Regulations of the Wellington Stock Exchange

In the Supreme Court of New Zealand

No. 5

"C" Letter from Sainsbury, Logan & Williams

11th August 1970

No. 5

"C" LETTER FROM SAINSBURY, LOGAN & WILLIAMS TO DISTRICT COMMISSIONER

"C"

SAINSBURY, LOGAN & WILLIAMS
Barristers & Solicitors

Napier

11th August, 1970

The District Commissioner,
Taxes Division,
Inland Revenue Department,
NAPIER.

Dear Sir,

Re: DUNCAN HOLDEN

We have been instructed to issue a formal objection to your assessment dated 28th July, on the following grounds:

(a) That if there is tax payable (which is denied) there has been a factual miscalculation of the tax payable.

(b) That there is no transaction which is taxable.

(c) That there has been no actual profit or gain (even if there is a transaction, which is denied) within the meaning of Section 88 of the Land Income Tax Act, 1954.

We should be grateful if you would do everything you can to accelerate the stating of the case but to let us peruse the draft before same is filed so that we can ensure that all points are covered.

Yours faithfully,
SAINSBURY, LOGAN & WILLIAMS

Per: 'J.H. Zohrab'

No. 6

CASE STATED (MENNEER v. COMMISSIONER OF INLAND REVENUE)

In the Supreme Court of New Zealand

No. 6

Case Stated (Menneer -v- Commissioner of Inland Revenue)

9th February 1972

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

No. M. 24/72

BETWEEN MAURICE CAMPBELL MENNEER of Tuki Tuki, Market Gardener — OBJECTOR

A N D THE COMMISSIONER OF INLAND REVENUE — COMMISSIONER

C A S E S T A T E D

pursuant to section 32 of the Land and Income Tax Act 1954

1. DURING the 1964 calendar year the Objector immigrated to New Zealand from the United Kingdom. At material times the Objector resided at Hastings where he was employed as an orchard worker. Subsequently he has resided at Tuki Tuki, No. 2 R.D. Hastings, where he carried on the business of market gardener.

2. IN furnishing a return of income to the Commissioner it was declared on behalf of the Objector that the income derived by him from employment as an orchard worker during the year ended on the 31st day of March 1966 was £638.12. 0.

3. SUBSEQUENTLY the Commissioner ascertained that during the year ended on the 31st day of March 1966 the Objector purchased overseas securities with overseas currency and shortly thereafter sold the said securities in New Zealand for New Zealand currency. Details of such transactions are as follows:

In the Supreme Court of New Zealand

No. 6

Case Stated (Menneer -v- Commissioner of Inland Revenue)

9th February 1972 (continued)

Date	Purchase Price (Sterling)	Selling Price Less Stamp Duty and Brokerage Charges (N.Z.Currency)	Difference between Purchase Price and Selling Price
	£	£	£
21.5.65 Bought £700 Sterling Bonds	700. 0. 0		
21.5.65 Sold £700 Sterling Bonds		782. 2. 6	82. 2. 6.
24.6.65 Bought £4975.2.6. 5% Exchequer Stock 1967	4975. 2. 6		
24.6.65 Sold £4975.2.6 5% Exchequer Stock 1967		5606.19. 0	631.16. 6.
8. 7.65 Bought £1000 5% Exchequer Stock 1967	1000. 0. 0		
8. 7.65 Sold £1000 5% Exchequer Stock 1967		1123.11. 6	123.11. 6
8. 2.66 Bought £2000 5% Exchequer Stock 1967	2000. 0. 0		
8. 2.66 Sold £2000 5% Exchequer Stock 1967		2185. 0. 0	185. 0. 0
	£8675. 2. 6	£9697.13. 0	£1022.10. 6

Certified copies of the Objector's sharebroker's contract notes in respect of the aforementioned transactions are annexed hereto and marked "A". According to the Objector's sharebrokers' these contract notes are the only written record of the transactions, however, when such information was

first obtained by the Commissioner the share-brokers' records showed that British securities were purchased on behalf of the Objector on the dates indicated above. The overseas securities referred to would be in the nature of bearer stock, ownership of which would pass by delivery and the parcels of securities bought and sold would not be identifiable by descriptive numbers.

4. THE Commissioner considered that the said profit of £1022.10. 6 referred to in the previous paragraph hereof was assessable income of the Objector. Accordingly the Commissioner made an amended assessment of the amount on which in his judgment income tax ought to be levied on the Objector in respect of the year ended on the 31st day of March 1966 and the amount of such tax for that year as follows:

Assessable income returned	£ 638.12. 0
Add profit on sale of overseas securities	£1022.10. 6
	£1661. 2. 6
Income Tax	£ 274.14. 6

5. THE Objector objected to the assessment referred to in the previous paragraph hereof on the grounds set forth in his accountants' letter dated the 1st day of December 1969. A copy of such letter is annexed hereto and marked "B".

6. SUBSEQUENTLY the Commissioner recalculated the said profits from the sale of overseas securities referred to in paragraphs 3 and 4 hereof and in doing so used the then prevailing official buying rate of £STG 100.0.0 = £NZ 100.7.6. Details of such calculations are as follows:

Purchase Price (Sterling)	Telegraphic Transfer Buying Rate (N.Z.)	Selling Price Less Charges (N.Z.)	Difference between Purchase Price and Selling Price at Official Rate
£8675. 2. 6	£8707.15. 0	£9697.13. 0	£989.18. 0

In the Supreme Court of New Zealand

No. 6

Case Stated (Menneer -v- Commissioner of Inland Revenue)

9th February 1972 (continued)

7. ACCORDINGLY on the 3rd day of September 1971 the Commissioner made an amended assessment of the amount on which in his judgment income tax ought to be levied on the Objector in respect of the year ended on the 31st day of March 1966 and the amount of such tax for that year as follows:

Assessable income returned	£ 638.12. 0
Add profit on sale of overseas securities	£ 989.18. 0
	£1628.10. 0
Income Tax	£ 264. 9. 7

8. THE Objector restated his objection to the amended assessment referred to in the previous paragraph hereof by letter from his solicitors dated the 3rd day of September 1971. A copy of such letter is annexed hereto and marked "C".

9. UPON such objection being disallowed the Commissioner was required to state this case.

10. THE OBJECTOR contends:

(a) That neither the sum of £989.18. 0 nor any part thereof included in the amended assessment for the year ended 30th June 1966 is income;

(b) The business of the Objector does not, nor did it at any material time include dealing in any personal property, and, in particular, does not nor did it at any material time comprise dealing in stocks or securities;

(c) That none of the stock or securities referred to in such amended assessments, and no property of any kind, was acquired by the Objector for the purpose of selling or other disposing of it;

(d) No profits or gains were derived by the Objector from the carrying on, or the carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit, with respect to stock or securities or otherwise;

(e) The transfer by the Objector of assets in the United Kingdom to New Zealand did not yield profit or gain to the Objector within the

meaning of s.88 of the Land and Income Tax Act 1954 or otherwise;

(f) The official exchange rate, as referred to in paragraph 6 hereof, is not relevant in determining whether or not a profit or gain was derived by the Objector.

11. THE Commission contends -

(1) That the sums referred to in paragraph 7 hereof as "profit on sale of overseas securities" constituted assessable income of the Objector for the respective years in question under section 88(1)(c) of the Land and Income Tax Act 1954 and, in particular, constituted

(i) profits or gains derived from the sale of personal property which was acquired for the purpose of selling it, and

(ii) profits or gains derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit;

(2) That such sums constituted assessable income of the Objector under section 88(1)(g) of the said Act;

(3) That such sums constituted assessable income of the Objector according to ordinary concepts.

12. THE question for determination of this Honourable Court is whether the Commissioner acted incorrectly in making the assessment referred to in paragraph 7 hereof and, if so, then in what respects should such assessments be amended.

DATED at Wellington this 9th day of February 1972.

'D.A. Stevens'

Commissioner of Inland Revenue

In the Supreme Court of New Zealand

No. 7(a)

"A" Share-brokers Contract Notes No.2304 (Sold)

No. 7(a)

"A" SHAREBROKERS CONTRACT NOTES

No.2304 (Sold)

BAYLISS, HOWELL & WOODHAM
Sharebrokers
K. H. BAYLISS
(Country Member Wellington Stock Exchange)
C/N 2304

Telephones 57-159 (4 lines)
P.O.Box 1040
QUEEN STREET
HASTINGS N.Z.
Telex 3245
Telegrams & Cables "BAYCOUNT"

COPY ONLY

C O N T R A C T N O T E

Sold on Account of

Mr. M.C. Menneer,

Tuki Tuki R.D. 2, Hastings.

Subject to the Rules and Regulations of the Wellington Stock Exchange

21/5/65	£700 Sterling	112.17. 6	790. 2. 6
	Stamp Duty	1. 0. 0	
	Brokerage	7. 0. 0	8. 0. 0
		£	782. 2. 6

BAYLISS, HOWELL & WOODHAM as Brokers

per .....

In the Supreme Court of New Zealand

No. 7(b)

"A" Share-brokers Contract Notes

No.2437 (Sold)

No. 7(b)

No.2437 (Sold) "A"

BAYLISS, HOWELL & WOODHAM
Sharebrokers
K. H. BAYLISS
(Country Member Wellington Stock Exchange)

COPY ONLY

Telephones 67-159 (4 lines)
P.O. Box 1040

C O N T R A C T N O T E

QUEEN STREET
HASTINGS N.Z.

Sold on Account of

Telex 3245
Telegrams & Cables
"BAYCOUNT"

Mr. M.C. Menneer

C/N 2437

Tuki Tuki, R.D. 2, Hastings

Subject to the Rules and Regulations of the Wellington Stock Exchange

24/6/65	£4975. 2. 6 Sterling	1134	5634. 6. 6	
	Stamp Duty		2.10. 0	
	Brokerage		24.17. 6	27. 7. 6
				£ 5606.19. 0

BAYLISS, HOWELL & WOODHAM as Brokers

per .....

In the Supreme Court of New Zealand

No. 7(c)

"A" Share-brokers Contract Notes

No.2476 (Sold)

No. 7(c)

No. 2476 (Sold)

"A"

COPY ONLY

BAYLISS, HOWELL & WOODHAM
Sharebrokers
K. H. BAYLISS
(Country Member Wellington Stock Exchange)

Telephones 67-159 (4 lines)
P.O. Box 1040

QUEEN STREET
HASTINGS N.Z.

Telex 3245
Telegrams & Cables
"BAYCOUNT"

C O N T R A C T N O T E

Sold on Account of

Mr. M.C. Menneer

Tuki Tuki, R.D. 2, Hastings.

C/N 2476

Subject to the Rules and Regulations of the Wellington Stock Exchange

8/7/65	£1000 Exchequer	11¾	1135. 0. 0.
	Stamp Duty	1. 8. 6	
	Brokerage	10. 0. 0	
			£1123.11. 6

BAYLISS, HOWELL & WOODHAM as Brokers

per .....

No. 7(d)

No. 2844 (Sold) "A"

In the Supreme Court of New Zealand

No. 7(d)

"A" Share-brokers Contract Notes No.2844 (Sold)

BAYLISS, HOWELL & WOODHAM
Sharebrokers
K. H. BAYLISS
(Country Member Wellington Stock Exchange)

COPY ONLY

Telephones 67-159 (4 lines)
P.O. Box 1040

QUEEN STREET
HASTINGS N.Z.

Telex 3245
Telegrams & Cables
"BAYCOUNT"

C O N T R A C T N O T E

Sold on Account of

Mr. M.C. Menneer

C/N 2884

Tuki Tuki, R.D. 2, Hastings

Subject to the Rules and Regulations of the Wellington Stock Exchange

8/2/66	£2000 Sterling	110⅜	2207.10. 0
	Stamp Duty	2.10. 0	
	Brokerage	20. 0. 0	22.10. 0
	BAYLISS, HOWELL & WOODHAM as Brokers		£ 2185. 0. 0
	per		

In the Supreme Court of New Zealand

No. 8

"B" Letter from Bayliss, Howell & Woodham to Inland Revenue department 1st December 1969

No. 8

"B" LETTER FROM BAYLISS, HOWELL & WOODHAM TO INLAND REVENUE DEPARTMENT

"B"

BAYLISS, HOWELL & WOODHAM
Public Accountants

Hastings.

1 December 1969

Inland Revenue Department,
Private Bag,
NAPIER

Dear Sirs,

M.C. MENNEER

We acknowledge receipt of the amended assessment for 1966 dated 3 November 1969 and hereby formally object to this assessment.

We are mindful of recent comments of the Board of Review that subsequent proceedings are limited to the grounds stated in the objection and in the absence of a report of the Appeal Court decision on Hunter v. Inland Revenue Commissioner find it difficult to specify at this time all the grounds on which this objection is based. We understand that the Appeal Court decision is to be reported in January and we trust that under these circumstances an opportunity will be given to add further to the grounds for objection outlined herein.

Firstly, we object to the assessment on the grounds that the transactions on which the assessment is based did not result in any 'profit' or gain to our Client and therefore do not fall within Section 88 or any other Section of the Land and Income Tax Act 1954.

We do not agree that the official exchange rate is in any way relevant in establishing the equivalent New Zealand currency value of overseas assets or investments at any time or, in particular, at any stage in a series of transactions. At the time of these transactions, the purchase of overseas securities and subsequent sale in New Zealand was a

legitimate transaction and to the extent that the amount which could be realised was higher than the official rate of exchange one could say that a 'commercial' exchange rate existed. Accordingly the value in equivalent New Zealand currency terms of our Client's holdings at the 'commercial' rate of exchange prior to these transactions was identical to the amount eventually realised - no 'profit' or gain resulting.

Secondly we object to the assessment on the grounds that even if Section 88(c) of the Land and Income Tax Act 1954 was applicable no assessable 'profit' or gain resulted from these transactions. Our Client's business does not comprise dealing in such property. The acquisition of the securities referred to in the assessment was incidental to the objective of realising United Kingdom investments held which were already worth more than their face value at the official rate of exchange. It follows then that the sale of the original investments and purchase and resale of the new securities constituted only an exchange of investments of equal value. The transactions were not a scheme entered into or devised for the purpose of making a profit as the purpose was merely to realise in cash the value of United Kingdom investments held.

Mr. Menneer was a genuine immigrant to New Zealand and had necessarily to realise his United Kingdom capital. It is therefore quite clear that he did not acquire the original United Kingdom investments with the intention of making a profit and in transferring his funds to New Zealand his only consideration was to realise the most advantageous rate of exchange, i.e. the true worth of his original United Kingdom assets.

Yours faithfully,
BAYLISS, HOWELL & WOODHAM

per 'A.K. Carran'

In the Supreme Court of New Zealand

No. 9

"C" Letter from Sainsbury, Logan & Williams to District Commissioner 3rd September 1971

No. 9

"C" LETTER FROM SAINSBURY, LOGAN & WILLIAMS TO DISTRICT COMMISSIONER

"C"

SAINSBURY, LOGAN & WILLIAMS
Barristers & Solicitors

Napier

3rd September, 1971

The District Commissioner,
Taxes Division,
Inland Revenue Department,
NAPIER.

Dear Sir,

Re: M.C. MENNEER

We have been instructed to issue a formal objection to your assessment of income on the grounds that -

(a) If there is tax payable (which is denied) there has been a factual miscalculation of the tax payable.

(b) That there is no transaction which is taxable.

(c) That there has been no actual profit or gain (even if there is a transaction which is denied) within the meaning of Section 88 of the Land and Income Tax Act, 1954.

Yours faithfully,
SAINSBURY, LOGAN & WILLIAMS

per 'J.H. Zohrab'

No. 10

In the Supreme Court of New Zealand

No. 10

Notes of Evidence taken before Ha lam J 16th February 1972

NOTES OF EVIDENCE TAKEN BEFORE THE HONOURABLE Mr JUSTICE HA LAM

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY — No. M.285/71

BETWEEN DUNCAN HOLDEN — Objector

A N D THE COMMISSIONER OF INLAND REVENUE — Commissioner

A N D

BETWEEN MAURICE CAMPBELL MENNEER — Objector

A N D THE COMMISSIONER OF INLAND REVENUE — Commissioner

NOTES OF EVIDENCE TAKEN BEFORE HASLAM J.

Hearing: 16 February 1972

Counsel: Dr Barton for both Objectors
Dr Richardson and Cathro for Commissioner

DR BARTON OPENS:

BY CONSENT the Commissioner calls first STEPHEN WILLIAM JOHNS of Wellington, Reserve Bank Officer, who reads Statement of his Evidence-in-Chief -

A

Stephen William Johns Written Evidence-in-Chief

"My full name is Stephen William Johns and I am a Reserve Bank Officer stationed at Wellington.

1. I have for the last three years been a Special Duties Officer in the Exchange Control Investigation Unit of the Bank.

2. During the period 1 June 1964 to 31 December 1966 New Zealand controls through the Reserve Bank of transactions by New Zealand residents in foreign currency and assets were provided

(i) Until 17 September 1965 under the Finance Emergency Regulations 1940 (No.2) (Reprint S.R. 1953/113).

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Ha lam J

A

Stephen William Johns
Written Evidence-in-Chief
16th February 1972
(continued)

(ii) From 17 September 1965 to 16 June 1966 under the Exchange Control Regulations 1965 (S.R. 1965/158) made under the Reserve Bank of New Zealand Act 1964

(iii) From 16 June 1966 (S.R. 1966/97) under the same Regulations but subject to different Exemptions.

3. The Sterling Area Currency and Securities Exemption Notice 1953 (S.R. 1953/1) made pursuant to the Finance Emergency Regulations 1940 (No. 2) (S.R. 1953/113 Page 601) had exempted foreign currency and foreign securities of sterling area countries from the operations of certain provisions of the regulations. A similar notice under the Exchange Control Regulations 1965 (S.R. 1965/159) provided exemption from certain provisions of these regulations. On 16 June 1966 that exemption was in part withdrawn.

4. The Official rates of exchange between sterling currency and New Zealand currency were set first pursuant to the Reserve Bank of New Zealand Act 1933 Section 16 and subsequently under the Reserve Bank of New Zealand Act 1964 Section 25.

5. In terms of the legislation referred to in the previous paragraph, the following rates were in operation from 1948 until devaluation in November 1967:

Trading and Reserve Bank buying rates for public transactions when delivery was required or made by telegraphic transfer:

£ST. 100. 0. 0. = £NZ. 100. 7. 6.

£AUST. 124.10. 9 = £NZ. 100. 0. 0.

On the introduction of decimal currency in Australia in February 1966 the rate became:

£AUST.249.08 = £NZ. 100. 0. 0.

6. For many years including the whole of the period from 1 January 1964 to 31 December 1966 both the United Kingdom and New Zealand have belonged to the International Monetary Fund, in the case of New Zealand under the authority given by the International Finance Agreements Act 1961, Section 3. The

membership agreement is annexed to the Act and Article IV Section 3 provides for foreign exchange transactions within the territories of member states to be based on parity as provided in the section.

7. During the period 1 January 1964 to 16 June 1966 New Zealand residents lawfully possessing funds in the sterling area and wishing to obtain New Zealand currency had three courses of action open to them:

(1) The foreign currency could be remitted to New Zealand through the New Zealand banking system at the official rate of exchange.

(2) The foreign currency could be sold to another New Zealand resident provided it was effected at the current official rate of exchange.

(3) The foreign currency could be used to purchase foreign assets which were then sold in New Zealand. The most common type of asset was foreign sterling area securities but subject to customs and other requirements the holders of foreign currency could bring other assets such as motor vehicles under the non remittance scheme to New Zealand; and subsequently sell them for New Zealand currency.

8. Although the sale of foreign currency to trading banks and New Zealand residents was by law effected at the current rate of exchange which had been fixed from time to time by the Reserve Bank, the Bank was not in a position to rule what value could be placed on various shares and thus with all commercial transactions the price of the shares in New Zealand reflected purchaser demand.

As the sterling area shares acquired for New Zealand currency could be sold overseas for foreign currency by the new owner and the foreign currency so acquired retained overseas the price of these shares was normally higher at times when it was more difficult for New Zealand residents to acquire foreign currency from official sources.

The Reserve Bank has no knowledge of the scale of the sale of foreign currency between New Zealand residents or of details of the sale of sterling area securities for New Zealand currency.

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

A

Stephen William Johns

Written Evidence-in-Chief

16th February 1972

(continued)

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

A
Stephen William Johns
Written Evidence-in-Chief
16th February 1972
(continued)

Cross-Examination

I am therefore not able to state what price a New Zealand resident would receive at any particular time from the sale of sterling area shares in New Zealand.

XXM: DR BARTON:

With reference to last page, paragraph 8 line 7, would you agree that that statement applies equally to the price of overseas domiciled Government stock? Insofar as the price of one particular Stock of U.K. Government Stock on the U.K. market was worth in London more than another kind of Government U.K. Stock. That difference would be reflected in the price of the two stocks in New Zealand. Does the statement there "the price of the shares in New Zealand reflect the purchaser demand", does that apply equally to U.K. Stock? Yes. Would it be true that the different value placed by New Zealanders who wish to purchase such Stock or shares express the rate that the market placed on such overseas funds? From the Reserve Bank's point of view as mentioned in my statement it is not possible for the Reserve Bank to rule on the value of shares. Because of this I consider the matter is covered in the second paragraph of Section 8 of my statement. The vast bulk in my opinion of purchasers of the New Zealand Stock Exchange securities was for the purpose of resale in the U.K. by the new owner and thus the retention of free sterling funds in his own name for purposes known to him. Did not this value express the rates that the market placed upon these overseas funds? I don't really think I am competent to answer that; I think it would be more appropriate for a Stock Broker. If a Stock Broker were to give evidence that there was a continuous flow of transactions involving the purchase by New Zealanders of U.K. Government securities, would you consider that the prices paid reflected the market value of those securities? In New Zealand, yes.

RE-XM: NO QUESTIONS.

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

B

Mr. Sydney Geoffrey Longuet Examination-in-Chief 16th February 1972

DR BARTON CALLS:

SYDNEY GEOFFREY LONGUET (Sworn): I am a partner in the firm of Harcourt, Longuet and Company. I am a member of the Wellington Stock Exchange. I was the Sharebroker concerned with some of the transactions on behalf of Mr Duncan Holden which are relevant to the question now before the Court.

(Counsel refers in Case Stated 285/71 to first two items in Paragraph 4, i.e. Purchase and Sale occurring in two instances on 18 May 1965.)

I produce the Bought and Sold notes in relation to the acquisition and purchase of £596.15. 0 sterling conversion loan stock 1972, 6% conversion loan stock 1972. The purchase price was £596.15. 0 sterling. The selling price was in New Zealand currency - the net price was £668. 7. 6. There was apparently 1% brokerage charged on one note which would cover both transactions and that was £5.19. 0. A client comes to us with London funds; he has several methods of bringing the money to New Zealand as explained by the Reserve Bank Officer. One method is to bring the funds through the bank ata fixed rate, or alternatively he can buy or we can buy for him a security in London with his London funds. That security could be sold in New Zealand at a price numerically higher than the English price. What I mean by that is if it were 100 in London it could be 105 or 110 in New Zealand currency and this enables the client to obtain more New Zealand funds for his English money than he could obtain from bringing it through the Bank. The elements of the transaction were merely to purchase a sterling security, best suited to the type of operation and to the demand in New Zealand. That was paid for by the client in London and on the sale the proceeds of the New Zealand sale were paid to him. Our London agents, member of the London Stock Exchange in this case, effected the sale in London. How did you agree upon or fix a price for the sale of the securities in New Zealand? As I was saying a broker's job is to obtain the highest price for any security which he is selling for a client, and similarly a buying broker buys at as cheap a price as he can, so the price that we would sell would be the best price we could obtain from a broker. Where exactly did these transactions take place? As usually at the Stock Exchange or between

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

B

Mr. Sydney Geoffrey Longuet Examination-in-Chief 16th February 1972 (continued)

brokers by telegram. And when you had as you had in that instance - I am referring to the material in your hand, when you had to purchase some Government Stock would there be any difficulty about the actual purchase of that Stock on behalf of Mr. Holden? No. When you came to the sale of that stock what exactly did you do? We merely sold a certain parcel of overseas securities to a New Zealander for New Zealand currency. And did the elements of that transaction take place either at the Stock Exchange or between you and some other broker? Yes unless it was bought for one of our own clients in which case it would go through our office based on the normal market rate. How do you arrive at the normal market rate? The rate which is the best rate you can get for buying or selling. It is purely a question of supply and demand. And at any given time how do you know what the best price is? You can only know from the most recent sales by your own opinion how demand or supply could be effected and by what brokers throughout the country are prepared or able to pay for it.

MORNING ADJOURNMENT

Did you agree with some other broker or at the Exchange or when you purchased from your own firm's funds, on an appropriate rate before or after you cabled your agent in London? The appropriate rate would be fixed and it would be a rate which would be equivalent to the premium on the security. The final transaction was completed on that basis. And at which point of time was a cable sent to your London agents? Cables were always sent at the end of the day, and the reply would be received in the morning.

(Witness referred to EXHIBITS A and B). The sold note number is the very next number to the bought note number? Yes. What does that indicate so far as the contemporaneity of the two transactions goes? Just that they are evidence of two sides of the transaction. One is for the purchase of the stock in London and the sale in New Zealand. They are the same transaction. Is it possible to know from those notes or from your general knowledge as a stockbroker what period of time would elapse between buying Government Stock and selling it? It is completely simultaneous. There is a buyer who has bought an overseas stock at a New Zealand price

and when we exchange contract notes we merely give him evidence and details of what actual stock was sold in London which he actually bought in New Zealand. You will possibly recall that when Mr. Johns gave evidence he referred to shares at several points in his evidence? Yes. Did you purchase any shares on behalf of Mr Holden over the period with which the Court is concerned? Not for this purpose. As between shares and Government Stock, why did you choose Government Stock? It is always done in Government Stock because the amounts were readily suitable to the amount of money that was held Government Stock in London can be bought for down to a £1. and also the rates on Government Stock are the lowest rates you can buy. I think the rates of brokerage on Stock were ½% reducing on larger amounts while the brokerage on shares was 1½% of the consideration. From your experience as a stockbroker are you able to give the Court any indication of the flow of this kind of business during the year 1965 and the year 1966 until it was stopped? I couldn't give an accurate statement of that at all except to say that it would run into some millions of pounds. That was in connection with the overall market. I did look at our records and in that year there seemed to be something over one hundred thousand a month with some larger thousands purchased as well. In your capacity as a stockbroker have you from time to time valued for estate duty purposes U.K.Government Stock held by New Zealand residents? Yes. If you were called upon to fix a value for estate duty purposes on that 6% conversion loan stock described in the bought and sold notes, what value would you assign to it? On this date, 18th May 1965, I would have assigned the price of £113%. That would give you? A premium of 13%. And a total net figure? £674. 6. 6. That is different to the figure mentioned before because there is a brokerage charge which wouldn't come into the valuation. The difference between that figute you have mentioned and the figure in the case stated, is that in the latter a brokerage fee has been deducted which would not have come into any valuation that you would carry out? That is correct. What is the attitude of the Inland Revenue Department on valuations on that basis? The Inland Revenue Department knows that overseas securities are quoted at a higher figure in New Zealand than the overseas equivalent at the Bank rate. I mean the

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

B

Mr. Sydney Geoffrey Longuet
Examination-in-Chief
16th February 1972
(continued)

Cross-Examination

Inland Revenue Department. Is it the position that a valuation on that basis is acceptable to the Inland Revenue Department? Yes, in fact they insist on it. If anyone valued an overseas security at the present time or at the time when there was normally premium at the same price as the overseas price, it would not be accepted.

XXM: DR RICHARDSON:

During this period between May 1965 and June 1966, were there many U.K. Stocks and shares which could be purchased in sterling and sold for New Zealand currency? Yes. Did those securities include shares in public companies as well as Government Stock? Yes, anything that was available in London was available to be purchased. In deciding what securities to buy would our hypothetical New Zealand purchaser be particularly concerned with the demand for different classes of security by buyers in New Zealand currency? Yes. Did that depend to some extent on the nature of the security purchased? It would depend on what the buying broker wanted the overseas security for. Would it depend on the buying broker's estimate of the number and classes of New Zealand buyers for the different range of securities? If a buyer wanted funds, if he wanted to buy an overseas security in New Zealand currency purely for the resale in London or overseas to obtain funds he wouldn't be interested in the particular class of security. Except he would be interested in a security which would suit his client's needs best. By that I mean he would not buy shares if he could buy stock because it would be more expensive for his client. On the other hand, if some client wanted a particular stock he could buy it from the broker whose client had the London funds and that client would buy that particular security in London to complete the sale of that stock to the New Zealand buyer. Would the classes of buyers with New Zealand funds for U.K. securities include buyers buying for investment purposes? It could. Would their presence in the market for particular classes of stocks and shares affect prices? Generally not. Would it depend on how numerous they were at any one time? In New Zealand? Supply and demand must come into it, but if it was a normal English stock which could be bought readily in England and there was someone who had funds in London, any number

of people who had funds in London would be happy to buy that stock in London and sell it to the person who required it in New Zealand. So if there are variance in bought and sold there should not be very much difference in the ruling rate. But as between different shares and stocks on the Stock Exchange at any one particular time was the demand by holders of New Zealand currency dependent on the particular shares and stocks available? It must be ordinary supply and demand yes, and that would affect prices. But what I am saying is that if there are a number of people with funds in London who can purchase and supply that particular share there should not be very much margin of difference, over the ruling rates. Coming closer to home, would there apparently be a greater demand by the holders of New Zealand currency for B.H.P. stock than certain other Australian stock? Yes at times people have paid a higher brokerage for Broken Hill but at times they would pay less. If there was a higher demand for New Zealand currency the amount paid could be less than what is normally accepted. Would you agree that to some extent the market for English stocks and shares in 1965 by the holders of New Zealand currency depended upon the interest in the particular security? No. Up to a point it is purely a question of supply and demand yes. Securities bought and sold in this case - were any of these sales you made for Mr Holden effected through the New Zealand Stock Exchange? I haven't the record, but I would imagine certainly. Could you indicate what portion at that time of transactions in the U.K. securities in New Zealand were effected directly through the Stock Exchange? No I can't. All I can say is that it was a very steady market and no broker would put transactions through his own office which weren't in line with an established market. Did the gain or premium obtainable through purchase and sale of overseas securities fluctuate to some extent from time to time? Yes. We know from the Hunter case that in July/August 1962 the premium was approximately 6%: in the case of Mr Holden on my calculations the premium on his transactions in the year ended 30 June 1965 was approximately 11.5% and for the next year was approximately 12.5% Would those figures be in line with your experience at the time? Yes. At this time and subsequent to ... Could the holders of sterling funds in 1965 bring tangible assets to New Zealand with those funds? You mean

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

B
Mr. Sydney Geoffrey Longuet
Cross-Examination
16th February 1972
(continued)

outside securities: I don't know, I am a broker I am afraid. I think they could. In 1965 was the no-remittance scheme for motor vehicles in force? To the best of my knowledge it was, I am pretty sure it was, yes. Under that scheme and subject to legal requirements, a holder of foreign currency could bring motor vehicles to New Zealand? Yes, that is right, but the scheme was closed off and I don't know the exact date. Subject to legal requirements could those motor vehicles be sold subsequently for New Zealand currency? Yes under certain restrictions. Were there other classes of assets which in 1965 could be bought with overseas funds and later sold for New Zealand currency? I don't really know, but I would imagine that was the case. Would the premium available in such a transaction depend on the demand for the type of property imported into New Zealand? Presumably.

Witness referred to Evidence, page 2, line 22 - the brokerage on the notes was in New Zealand currency. Was your brokerage on the purchase of the U.K. Stock based on the conversion of the sterling at the official rate? The ½% brokerage charged is based on the nominal value of the Stock, the face value not the consideration.

Re-examination

RE-XM: If you were advising someone who wished to bring sterling funds to New Zealand in 1965/66, what assets would you advise them to purchase and sell? If they came to me I would suggest they buy British securities and sell them in New Zealand at the best price they could get. If you were advising a New Zealand purchaser of sterling what advice would you give him? The same but in reverse because that was the only way he had of obtaining overseas funds at that time.

C
James Wilmot Rowe
Written Evidence-in-Chief

DR BARTON CALLS:

JAMES WILMOT ROWE (Sworn): Professor of Economics, Massey University. (Reads written evidence-in-chief):

"1. This evidence is based on some 25 years of study of economics and over 10 years of practical experience, first as research director for the N.Z. Bankers' Association and latterly as director of the N.Z. Institute of Economic Research, but I do not, of course, claim to be expert in all aspects of foreign exchange transactions.

2. Prior to the November 1967 devaluation the £NZ was overvalued in the sense that the official exchange rate could not have been sustained without quantative restrictions on imports and exchange controls on current transactions abroad. The official justification for thus regulating foreign exchange dealings was that without such regulations the outflow of funds from New Zealand would have so exceeded the inflow as to exhaust the country's overseas assets and ultimately compel devaluation. I know of no economist, nor indeed anyone else, who would deny that New Zealand had an (officially) overvalued exchange rate in the years immediately prior to 1967. Indeed, this is implicit in Government's decision on 21 November 1967 to devalue by 19.45 per cent against sterling following the 14.3 per cent devaluation of that currency against the (United States dollar.

3. In this period the basic official relationship between New Zealand and other currencies was determined by the Minister of Finance in accordance with the Reserve Bank of New Zealand Act 1964 and fixed in terms of sterling. The Reserve Bank set the actual exchange rates used by the trading banks, as agents for all ordinary foreign exchange transactions, in the light of this (constant) £Stg-£NZ relationship but allowing for interest factors arising from timing differences and incorporating miscellaneous service charges. Thus during 1965 and 1966 the TT (telegraphic transfer) buying rate was £Stg100-£NZ100.7.6, i.e. anyone offering £Stg100 to a bank received £NZ100.7.6 in return. Since the £A was tied to sterling in the same way as the £NZ, there was also a fixed rate of exchange between Australia and New Zealand throughout 1965 and 1966.

4. The only legal means of effecting ordinary direct currency-to-currency exchange in 1965 and 1966 was via a trading bank at the appropriate official exchange rate but there were at least two well-known alternative de facto but legal exchange rates; one involving dealings in fixed interest securities, e.g. U.K. Government stock, and the other involving equities, e.g. Australian shares. In the years 1965 and 1966 (at least) a more favourable rate of exchange was realisable by anyone who exchanged U.K. Government stock or Australian shares for New Zealand currency because

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

C

James Wilmot Rowe

Written Evidence-in-Chief

16th February 1972

(continued)

of the pent-up demand for overseas securities by holders of the latter.

5. Both U.K. Government stock and Australian shares are but examples of readily negotiable overseas assets. In principle, a similarly favourable exchange rate was realisable in respect of any property in the sterling area abroad; the two singled out above were, however, convenient and commonly used vehicles for effecting the exchange of foreign assets and local currency. On the one hand there were many people in New Zealand anxious to purchase assets overseas in excess of those they might acquire with foreign currency via the banking system because of the restrictive exchange controls then in force, and such people were prepared to pay a significant margin in order to do so. On the other hand there were people with assets in the United Kingdom, Australia and elsewhere who wished to exchange these assets for New Zealand currency and they were naturally not unwilling to do so at a rate more favourable than that available via the banking system. The existence of such a de facto exchange rate of course indicates that the volume of funds seeking to leave New Zealand was greater than the reverse flow would have been at the official exchange rate (in the absence of exchange controls) and the difference at any one time reflected the relative magnitude of the two flows.

6. For example, on 18.5.65 the Objector achieved an exchange rate of £Stg100-£NZ112.003 on the sale of some (U.K.) Conversion Loan Stock(1972) compared with the then official exchange rate of £Stg100-£NZ100.375. On the same date the de facto exchange rate in respect of dealings in Australian shares was somewhat lower, viz. £A100-£NZ92.056 compared with the official exchange rate of £A100-£NZ80.295 - a ratio of 100 : 111.

7. The realised exchange rates in respect of the dealings in U.K. Government stock involved in this case are shown below against the relevant dates. (The official exchange throughout the period was £Stg100-£NZ100.375).

Date	Exchange Rate
18.5.65	112.003
18.5.65	111.940
19.7.65	112.935
20.7.65	112.935
20.7.65	112.935
23.7.65	113.123
5.8.65	113.433
9.8.65	113.499
22.4.66	107.432
15.6.66	109.543

8. The above are but a few examples of the many such transactions which took place in this period, realising similar de facto exchange rates. Another common form of exchange between foreign assets and New Zealand currency was in respect of Australian shares. The table below sets out, for the same dates as that above, the corresponding exchange rates in respect of these. (The official exchange rate throughout the period was £A100-£NZ80.295).

Date	Exchange Rate
18.5.65	90.00
19.7.65	91.00
20.7.65	91.03
23.7.65	91.35
5.8.65	91.34
9.8.65	91.43
22.4.66	86.40
15.6.66	88.24

9. The essential issue in each type of transaction was that someone was prepared to exchange New Zealand pounds for a negotiable foreign asset at a rate which was more favourable to the owner of the foreign asset than if the latter were to realise his asset abroad and exchange the proceeds for New Zealand currency via the banking system. In other words a legal double (or multiple) exchange rate existed in respect of foreign property - to - local currency transactions.

10. In calculating the above exchange rates realised on dealings in Australian shares the following procedures were adopted:

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

C
James Wilmot Rowe
Written Evidence-in-Chief
16th February 1972
(continued)

(a) Compare the opening price in New Zealand of each Australian share traded with its closing price in Sydney or Melbourne the day before, on the grounds that nearly half a typical day's trading in New Zealand in 1965 and 66 was concluded before New Zealand brokers received their first progress report on Australian trading, and to simplify calculations. All prices are as reported in The Press.

(b) Take the New Zealand price corresponding to the largest parcel of shares of a stock traded on the relevant day.

(c) Exclude 'odd lots', the more speculative mining stocks, and transactions involving rights and notes. Otherwise include all shares traded on both sides of the Tasman at prices of 5/- or over.

(d) For each share selected calculate the actual exchange rate.

(e) Find the median exchange rate ruling on a given day.

11. Another (legal) means of exchanging foreign assets for something of value in New Zealand which was in common use in 1965 and 1966, and officially encouraged, was the no-remittance scheme for motor cars. The essence of this scheme was that 'qualifying' overseas funds could be used to meet the foreign exchange cost of a car made available in New Zealand on terms very favourable to those with qualifying funds. It would be difficult to calculate the representative exchange rate implicit in such transactions but in 1965 and 1966 it was almost certainly greatly in excess of those noted above in respect of dealings in U.K. Government stock and Australian shares."

C
James Wilmot Rowe
Further Evidence-in-Chief

FURTHER EVIDENCE-IN-CHIEF:

In respect of the last sentence of my typed testimony, I wish to add that 30% would be a not atypical implicit exchange rate.

XXM: DR RICHARDSON: (Referring to Paragraph 10 of Evidence-in-Chief). Are you referring there to the procedures you adopted in calculating what you refer to in paragraph 8 as the exchange rate? Correct. Did the purchases by New Zealand buyers include purchases for investment purposes? I cannot answer that exactly, but I would presume so. Would you know what proportion of the transactions which you included in your calculations were purchases for investment purposes? I would not know exactly but my general knowledge would indicate that they would be in a minority compared with the purchase for the purpose specified here.

RE-XM: NO QUESTIONS.

DR BARTON CALLS:

GERT AUGUST LAU (Sworn): Business Consultant, Wellington. (Reads written Evidence-in-Chief) -

"Having been trained as a banker in a large Continental Trading Bank, I have a background which makes me conversant with exchange rates. In addition thereto, apart from any academic background my active connection with many overseas transactions during the last 33 years in New Zealand, has continued to keep me conversant with all aspects of exchange markets.

During the period when there were no import or currency restrictions and there was a free market in exchange within a small band of perhaps 1%, at any one time there was one rate for each currency. When, in various countries, exchange restrictions came into being in the early 1930's the picture changed because Government allowed certain overseas funds to be used for limited purposes sometimes to a varying degree, according to their origin. At one time as a business consultant in Germany in the 1930's, in one week I had to deal in several varieties of Marks at entirely different rates based on the purposes to which the overseas funds could be applied. Some countries during the last 40 years had what is called "multiple exchange rates". This means there was one price for overseas funds for imports, another price for say travelling and again a completely different price

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

D

Gert August Lau

Written Evidence-in-Chief

16th February 1972

(continued)

at which the Government bought currencies resulting from exports.

Where there is a duality or multiplicity of exchange rates, this is due to the fact that the official exchange rate is an artificial one only and does not express the value the market attributes to that currency. Therefore, if it is legally possible to acquire overseas currency for a purpose for which funds are not available at the artificially pegged rate, a second rate evolves.

Up to the early 1950's New Zealand had a fixed rate applying to all funds and the New Zealand holders of overseas funds were not permitted to use any of such funds without the consent of the Reserve Bank. About 1950 the Government announced a scheme whereby New Zealand holders of overseas funds (including securities) in the sterling area could apply them for a certain number of uses such as the importation of goods, sale and re-investment within the sterling area and, also for travelling. The Government went further and allowed the holders of overseas funds to sell them to another New Zealand resident who could apply them for the permitted purposes. The Government put one restriction on such sale, namely that if it was currency and not securities which were being transferred from one New Zealand resident to the other, it had to be at the officially pegged exchange rate, but no such restriction was applied to the transfer of securities or to the purchase of sterling securities out of sterling accounts and their subsequent sale.

The foregoing measures established immediately a dual exchange rate for overseas funds held by New Zealand residents. The price for overseas securities at the New Zealand Stock Exchange rose substantially above the pegged equivalent market price in Australia or London, sometimes to the extent of 20% and numerous transactions took place over the years. As a result of the foregoing overseas assets held by a New Zealand resident attained a new value at the time the Government measures were first announced. As indicated, this did not apply only to securities held by overseas residents but also funds held in Banks or on loan, as they were immediately convertible into overseas securities which could be sold in New Zealand at the rate applicable to such securities.

To bring the picture up to date, the transferability of overseas funds by New Zealand residents was, for practical purposes, eliminated by new regulations issued in 1966 and the increasing requirements by the Reserve Bank for additional remittances to cover imports under the Non-Remittance Scheme and, finally, its abolition this month, have reduced the difference in the exchange rate in the average to a few percent only.

In my experience for Estate Duty purposes the Inland Revenue Department does not base the duty on overseas securities on the Stock Exchange price ruling at the Stock Exchange of the country where the securities are domiciled, but applies the higher market value in New Zealand, i.e. estates have been liable to Death Duty in respect of securities on the difference between the two exchange rates.

In a particular case with which I was connected the Department went further. It claimed that the difference between the overseas Stock Exchange price of the securities and the price at which the same securities were traded between New Zealand residents at the New Zealand Stock Exchanges was not as high as would be obtained by selling Australian Securities on the Australian market, transferring the money to London, purchasing New Zealand Government securities domiciled in the United Kingdom and then selling them at the then ruling enhanced market price in New Zealand. In that case the Department calculated Estate Duty on the basis of converting shares into money, money into overseas domiciled Government Stock and selling the Government Stock in New Zealand. The Department claimed that this would be what a prudent executor would do. The Department did not suggest that there would be any tax payable thereon, nor in its calculation did the Department allow for a deduction of the tax. While I considered the attitude of the Department unreasonable because executors scarcely would go through the procedures suggested to obtain an addition one or two per cent and risk a market fluctuation, I certainly accepted the Department's calculation on the basis that the sale of overseas domiciled Government Stock in New Zealand would not attract taxation and that therefore, no deduction was to be made from the notional proceeds for tax. I considered that to a New Zealand resident an

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

D

Gert August Lau

Written Evidence-in-Chief

16th February 1972 (continued)

Oral Examination-in-Chief

overseas domiciled security including overseas domiciled Government Stock and including credits in a Bank, are worth the unofficial market rate and that, therefore, their sale at that rate through a purchase and realisation of securities does not return a profit."

ORAL EXAMINATION-IN-CHIEF:

I produce a letter addressed to me by the Inland Revenue Department dated 9th November 1966 in relation to the valuation of an asset in an Estate for which I was acting. (EXHIBIT C). (Witness reads letter, third paragraph) - "In arriving at this value, the security for the debt (the quoted Australian shares and the United Kingdom, R.T.Z /Rio Tinto Zinc/ shares) has been notionally sold for cash, less brokerage, and the funds remitted to New Zealand via London at the then ruling premium on Sterling in New Zealand". In the attachment, would you please assist the Court by indicating the portions where the Department carries out what it says it has done in the third paragraph? There is first a list of Australian securities, the total market value of which was £262,900. These were deemed to be sold and the brokerage of £4,537 was deducted. I should mention these are Australian pounds. The net balance of £258,363 was remitted notionally to London producing £205,867 sterling. The net proceeds from a sale of the Rio Tinto Shares in London amounted to £6,612. Then notionally New Zealand Government stock was purchased and resold notionally at the New Zealand market at 13% above par and after deduction of the notional brokerage of 1% this realised £237,977. Was the sale of the Rio Tinto Zinc holding actual or notional? Notional but because it was a London based company the Department made the sale a notional transaction. I wanted to add one aspect to my evidence-in-chief. A market always finds its own level. Therefore, the alternative market rate which existed for sterling security must be accepted as the value of sterling funds. It is estimated that in 1965 there were New Zealand residents holding over 250 million of sterling funds. If there was a profit of 12% to be made surely the holders of these 250 million sterling funds would have realised a profit. In my view the fact that they felt the 250 million overseas funds were worth 12% more overseas means there

is no profit from transferring in say 1965 £100 sterling to £112 New Zealand currency.

LUNCHEON ADJOURNMENT

By consent of Dr Richardson and in order to save time, I produce a transcript of the evidence which I gave in this Court in February 1971 in certain proceedings numbered respectively M.322/69 and M.323/69. I confirm that I am still of the same opinion.

(Dr Richardson agrees to the evidence being produced in this manner as being the most satisfactory way of being presented to this Court).

At pages 74 and 75 of Notes of Evidence, cross-examination of Dr Richardson:

"Was the method by which the Todd Family made the overseas funds available to Todd Motors by the purchase and sale of overseas securities? Yes. Mainly. On the purchase and sale did the Todd Family obtain a premium on their overseas funds of about 13% I don't think that figure is correct, I think it is closer to 10 but without going into details perhaps if you would say that the effect of the premium then I say yes. Was the amount of sterling made available by the Todd Family to Todd Motors through the purchase and sale of securities in 1964 and 1965 calendar years about £3.1 million? I haven't got the figure here. I wouldn't have thought it was as much as that but it was a substantial figure. Was the premium obtained by the Todd Family on those transactions about £240,000? I would say that figure is approximately correct. I should explain that the amount of the sale of security was the same as the Todd Family could have obtained from other buyers at the London market and in fact was transacted through a sharebroker. Did the Todd Family thus obtain a fair commercial return from Todd Motors in making these overseas funds available? I would not agree with that because they didn't receive any return from it. They received the value of their sterling funds and sterling funds at that time on the market other than through the Reserve Bank was about 110 for 100 just as a £1 was then $2.80 for £1. They did not receive any return. Did they receive £240,000 more than they would have had they brought the funds into New Zealand through banking channels? Yes because there were two sterling values in 1965 on the New Zealand market."

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

D
Gert August Lau
Oral Examination-in-Chief (continued)
16th February 1972 (continued)

EXAMINATION-IN-CHIEF (Continued)

Is it the position that as adviser for some of the Todd family interests the question which is raised in these two cases before the Court today is in dispute with the Inland Revenue Department or potentially in dispute? Yes.

TO BENCH: And still unresolved? Yes. They have asked for a case to be stated.

XXM: DR RICHARDSON: NO QUESTIONS.

LEAVE GIVEN TO COUNSEL FOR OBJECTORS TO SUBMIT TO COUNSEL FOR THE COMMISSIONER RESERVE BANK BULLETIN OF THE YEAR 1966 NOT PRESENTLY AVAILABLE IN COURT AND TO REQUEST AN OPPORTUNITY OF TENDERING IT IN EVIDENCE AT A LATER STAGE.

E
Duncan Holden
Evidence-in-Chief
16th February 1972 (continued)

DR BARTON CALLS:

DUNCAN HOLDEN (Sworn): I live in Havelock North and I am a farmer. In 1962 I became entitled to an interest in the estate of my late father. That estate consisted in part of certain assets in the United Kingdom - wholly. I decided to invest some of the property that came to me from my father's estate in the United Kingdom and some of it in Australia and to bring some of it to New Zealand. As and when assets became available to me I was advised by my solicitors for my father's estate. Some of the assets consisted of shares which I did not wish to retain. I took advice from Mr. Geoffrey Longuet of Wellington, Stockbroker, about bringing money into New Zealand. He advised me that I should purchase securities in England and sell those securities so that I would have the proceeds here in New Zealand. I had no discussions with him about the actual details of bring the money out to New Zealand. It would be true to say that he had general authority from me to take such steps as he thought it desirable for the purpose of bringing the money to New Zealand. It was the pattern followed by me to advise Mr.Longuet that whenever I received notification from the solicitors in England that assets were available and I wished to bring them to New Zealand I would advise him to take the necessary steps. I used the funds which were remitted to New Zealand for a variety of

purposes. They included paying for improvements on the farm. And the payment of gift duty on a gift to my son of a farm interest, and sometimes Mr Longuet purchased shares on my behalf. The bulk of the money from the funds were used for investment purposes. As to the funds which were remitted to Australia, they were invested in Australian shares. The dividends on those shares were paid to the credit of my Sydney Bank, i.e., the Bank of New Zealand, George Street, Sydney. I declared those dividends in my returns of income for those particular years in which I had received them. I retained those dividends in Australia for the most part. When I returned those dividends in my income tax returns, I indicated them in New Zealand currency at the official rate - my accountants prepared my accounts and I would say they certainly did so. I gave my Accountant all the relevant information and left the preparation of the returns to them.

In the Supreme Court of New Zealand

No. 10

Notes of Evidence taken before Haslam J

E

Duncan Holden Evidence-in-Chief 16th February 1972 (continued)

XXM: DR RICHARDSON: In the 1966 income year, did you have income in the United Kingdom of approximately £2,000 sterling? I couldn't answer that question exactly, but it could be so. (Original returns of witness for tax purposes for year ended 30 June 1966 shown to him to refresh memory). I agree that these details disclose roughly £2,000 of a United Kingdom income for that year. In the accounts was that income converted into New Zealand currency at the official exchange rate? Again my accountants prepare my accounts and I can't answer that question with any certainty.

Cross-Examination

RE-XM: NO QUESTIONS.

DR BARTON CALLS:

F

Maurice Campbell Menneer Evidence-in-Chief 16th February 1972

MAURICE CAMPBELL MENNEER (Sworn): I live in Tuki Tuki R.D. near Hastings. I am a Horticulturist. I immigrated to New Zealand from the United Kingdom in June 1964. I thereafter spent some time gaining experience in orchard and horticultural work in New Zealand. I intended to take up business on my own account in that particular type of activity. I was married in March 1965 and I then began to look for a property of my own in the Hastings District. At that stage I still had in England certain assets. They consisted of shares, property that had been

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Hasłam J

F
Maurice Campbell Menneer
Evidence-in-Chief
16th February 1972
(continued)

transferred to me by my father as a gift and interest in Unit Trusts. I had no shares. In August 1965 I had a particular interest in a property at Haumonoa near Hastings: It may have been a little bit after that period. I took possession of it about the end of January 1966. In order to complete the purchase, I wished to bring to New Zealand some of my United Kingdom assets. I then received advice to call on a Chartered Accountant who was also a stockbroker, a Mr Bayliss of Hastings. He indicated to me that it was possible to get a better rate of exchange than the official rate and I left all the arrangements to Mr Bayliss. When the funds became available in New Zealand he simply paid me a cheque for the net proceeds. Those I used for the purchase of my property. I had no discussion with him at the time about the mechanics of the operation about bringing the money to New Zealand.

XXM: NO QUESTIONS.

CONCLUSION OF EVIDENCE FOR BOTH OBJECTORS.

G
Frank Henry Lobb
Evidence-in-Chief
16th February 1972

DR RICHARDSON CALLS:

FRANK HENRY LOBB (Sworn): Senior Investigating Officer of the Inland Revenue Department.

I have special responsibility for the administration of Estate and Gift Duty. Regarding Valuation of different classes of assets in overseas Estate in New Zealand. Where there is a market in New Zealand and overseas the departmental practice is to take the value of the market which produces the highest value. If that market is the overseas market then the value so ascertained would be converted to New Zealand currency at the official ruling rate of exchange. If the higher value is in the New Zealand market do you simply take the New Zealand proceeds of the hypothetical sales? Yes. In the case of other assets, not directly saleable in a New Zealand market, do you take the proceeds of the assumed sale overseas and convert them to a New Zealand currency at the official exchange rate? Yes.

XXM: DR BARTON: (Exhibit C put to witness). I assume that you were not in Court this morning but have come down since the luncheon adjournment? Yes. Am I correct in assuming that the general content of that letter has been explained to you since you arrived in Court? Yes. It is the position that in valuing certain Australian shares for Estate duty purposes what the Department did was to remit the moneys notionally to England there add the proceeds of a notional sale of some English shares, and at that point notionally remit the moneys to New Zealand through the purchase and sale of sterling at a middle price of £113 less brokerage, is that correct? I don't know the rate which was converted but that would be correct. Schedule five lines from foot - "Stock at £113 middle price". In these notional exercises, the Department was deducting brokerage, wasn't it? Yes, that would appear so from the statement. Why did the Department not deduct income tax? Well I am not an expert on the income tax side, but it would appear to me that no income had arisen, there was no sale therefore there was no income to tax at that stage. But there was a deduction for brokerage although there was no sale? Well the brokerage would have to be incurred at some stage. The question I am putting to you is would not income tax have to be paid at some stage if the taxpayer there had actually done what the Department was notionally doing? As I said before I am not an expert on the tax side. My understanding of the position is from the Estate side but it would seem to me that that could follow. If the Department's contention in this case is correct that the difference between the actual proceeds obtained by the taxpayer and what they would have obtained by remitting the moneys at the official rate was a profit or gain, do you know of any case where a loss has been treated as deductible? I don't think I am qualified to answer that question.

RE-EXM: Is the general practice to convert the overseas income of New Zealand taxpayers into New Zealand currency at the official rates of exchange? Yes.

CONCLUSION OF EVIDENCE FOR COMMISSIONER

"A"

STERLING CONTRACT NOTE
(Telephone 46-440(4 lines)
P.O. Box 29
Cables & Telegrams:
"Longuet",Wellington

HARCOURT, LONGUET & CO.
S.Geoffrey Longuet John Milne Harcourt
D.Graeme Whyte,B.A. Phillip A.Taylor, B.Com.
Members of the Wellington Stock Exchange

South British Building
326 Lambton Quay
Wellington, N.Z.

Duncan Holden, Esq.
Bought Te Mara
For Miller Road,
Havelock North

Security
£596/15/0 6% Conversion Loan 1972

Date	Contract No.	Price	Amount	Brokerage	TOTAL Sterling Currency
May 18 '65	57,109	100. 0. 0	596.15. 0		696.15. 0

Subject to the Rules and Regulations of the Wellington Stock Exchange

HARCOURT, LONGUET & CO. As Brokers

"B"

CONTRACT NOTE
Telephone 46-440
(4 lines)
P.O. Box 29
Cables & Telegrams:
"Longuet",Wellington

HARCOURT, LONGUET & CO.
S.Geoffrey Longuet John Milne Harcourt
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South British Building
326 Lambton Quay
Wellington, N.Z.

Duncan Holden, Esq.
Sold Te Mara
For Miller Road,
Havelock North

Security
£596/15/0 6% Conversion Loan 1972

Date	Contract No.	Price	Amount	Brokerage	TOTAL
18/5/65	57110	£113	674. 6. 6	5.19. 0	668. 7. 6

Subject to the Rules and Regulations of the Wellington Stock Exchange

HARCOURT, LONGUET & CO. As Brokers

EXHIBIT "C" referred to in the Evidence of Frank Henry Lobb

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

Exhibit "C" referred to in the Evidence of Frank Henry Lobb

INLAND REVENUE DEPARTMENT
Head Office
Wellington

9 November 1966

Dr.G.A. Lau,
Business Consultant,
P.O. Box 1931
WELLINGTON.

Dear Dr. Lau,

ESTATE OF C.P. TODD W.1965/984

As at the date of death on 1 July 1965, the deceased was owed by C.P. Todd Investments Limited the sum of £266,681. 7. 11d. This was valued by you at £216,613. 4. 11d after making allowances for the realisation of the Australian shares in New Zealand, brokerage, and an amount of £100 for legal and accountancy expenses to effect the winding up.

This debt from C.P. Todd Investments Limited as distinct from the shareholding in the company has now been valued for estate duty purposes at £222,064. 8. 4d.

In arriving at this value, the security for the debt (tbe quoted Australian shares and the United Kingdom, R.T.Z. shares) has been notionally sold for cash, less brokerage, and the funds remitted to New Zealand via London at the then ruling premium on Sterling in New Zealand.

As we are not concerned with notionally liquidating the company of C.P. Todd Investments Limited in order to arrive at a cash value for the debt owing to C.P. Todd, no allowance has been made for legal or accountancy fees.

Yours faithfully,

'T.G.C. Mackay'

Special Inspector.

In the Supreme Court of New Zealand

No.10

Notes of Evidence taken before Haslam J

Exhibit "C" referred to in the Evidence of Frank Henry Lobb (continued)

EXHIBIT "C" (continued)

1.7.65 Amended

VALUATION OF DEBT DUE TO C.P.TODD BY C.P.TODD INVESTMENTS LTD.

COMPANY	NO.OF UNITS	SALE AT AUSTRALIAN PRICE	GROSS PROCEEDS
A.W.A.	8,200	24/-	£9840. 0. 0.
Ampol Shares	1,170	9/10	575. 5. 0.
Ampol Deferred	554	7/6	207.15. 0.
Ampol 67 Notes	308	7/9	119. 7. 0.
A.C.I.	3,432	56/-	9609.12. 0.
B.H.P.	9,903	48/6	24014.15. 6.
Burns Philp	4,500	71/9	16143.15. 0.
G.J. Coles	17,960	13/11	12497. 3. 4.
C.S.R.	7,794	62/9	24453.13. 6.
E.Z. Industries	3,600	19/6	3510. 0. 0.
Henry Jones Co-op.	2,721	71/6	9727.11. 6.
James Stedman	4,800	18/9	4500. 0. 0.
Queensland Insurance	1,560	74/6	5811. 0. 0.
Waltons Ltd. Shares	199,329	7/9 *	77239.19. 9.
Waltons 65 Notes	12,272	7/8 *	4704. 5. 4.
Waltons 66 Notes	23,768	7/3 *	8615.18. 0.
Woolworths	70,396	14/7 *	51330. 8. 4.
*Adjusted Gross Proceeds			262900. 9. 3
Less Brokerage 1½% of £262900.9.3. = £3943.10.2			
5/- per 100 on under 10/- £2374.01 =	593.10.0.		£4537. 0. 2.
			£258363. 9. 1.£A
Remitted to London at £125.10.0.Aust. =			£205867. 5.11.£Stg.
Add Proceeds 5480 Rio Tinto Zinc Corp. at 24/6 Stg	6713. 0. 0.		
Less Brokerage	100.13.10.		6612. 6. 2.
			£212479.12. 1.
Transfer to N.Z. through purchase & sale of Sterling Stock at £113 middle price less Brokerage at £1% = £112			£237977. 3. 1.
Add cash at bank as per Balance Sheet			3756.13.10.
			£241733.16.11.
Less liabilities other than to Estate			21664. 0. 7.
Available for debt to Estate			£220069.16. 4.

No. 11

REASONS FOR JUDGMENT OF MR. JUSTICE HASLAM

In the Supreme Court of New Zealand

No.11

Reasons for the Judgment of Haslam J.

7th March 1972

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

BETWEEN	DUNCAN HOLDEN	Objector
A N D	COMMISSIONER OF INLAND REVENUE	Commissioner

A N D

BETWEEN	MAURICE CAMPBELL MENNEER	Objector
A N D	COMMISSIONER OF INLAND REVENUE	Commissioner

REASONS FOR JUDGMENT OF HASLAM J.

Hearing: 16 February and 2 March 1972

Counsel: Dr. Barton for Objectors
Dr. Richardson and Cathro for Commissioner

Judgment: 7 March 1972

By consent, these two cases stated were heard together. It was agreed that they came before this Court as test cases raising identical questions covering the correctness of the assessments of each objector under the Land and Income Tax Act, 1954.

Counsel agreed that the oral evidence which was called by way of supplementation to the cases stated was relevant to each, and that the only essential difference between the two disputes were the figures and numbers of transactions. The objectors called the evidence of Mr. S.G. Longuet of Wellington, Sharebroker, Professor J.W. Rowe who occupies the Chair of Economics at Massey University, Dr. G.A.Lau, and each objector. The Commissioner called Mr. S.W. Johns, an Officer of the Reserve Bank in Wellington, and Mr. F.H. Lobb, Senior Investigating Officer of the Inland Revenue Department, with a special responsibility for the administration of estate and gift duties. I find (as was accepted by both counsel) that no questions of credibility arise in

In the Supreme Court of New Zealand

No.11

Reasons for the Judgment of Haslam J.

7th March 1972 (continued)

any instance, and that there have therefore been minimal advantages in having seen and heard the witnesses. In several cases, the evidence-in-chief was typed in advance and, after the oath had been administered, read by the witness as part of his testimony. Dr. Lau supplemented his typescript of evidence-in-chief by certain further evidence in which, by consent, he incorporated and adopted afresh his testimony in an earlier case involving similar issues. Every witness was cross-examined. Legal argument submitted to me on the first day of the hearing was confined to directing my attention to The Commissioner of Inland Revenue v. Hunter /1970/ N.Z.L.R. 116, which it was agreed was binding upon this Court in the instant case.

The objectors moved on the first day for an order removing the cases stated to the Court of Appeal in terms of s.64(d) of the Judicature Act, 1908. The Commissioner conceded that I had jurisdiction to make this order, which he nevertheless opposed, but counsel indicated that he was anxious for some direction from me about the attitude he should adopt thereon in the public interest. Both sides appeared to agree that an authoritative ruling is desired as early as possible, as many taxpayers will be affected by the ultimate decision, but that it is likely that this result will be reached only after the appellate processes have been exhausted.

After careful consideration I decided to refuse to make the order, and so pronounced on the second day of hearing. It appeared to me that the somewhat lengthy evidence lent itself to a careful selection at this level of relevant material which could be of assistance in legal argument at a later stage. I accordingly invited counsel to co-operate in submitting to me an agreed statement of facts which was accepted by both sides in supplementation of the narrative in the cases stated. I have now received that document which is set out below.

By understandable mistake on the part of one witness, he removed a document (Reserve Bank Bulletin 1966) when he retired after testifying and it was therefore not available for production later. I accordingly reserved leave to tender this document at the resumed hearing. While not disparaging the value of this publication, I decided that its production, without its being limited to a specific

topic to which a witness could depose and adopt as opinion evidence, would merely serve to widen and confuse an already lengthy narrative. The objectors wished to apply for the recall of the Commissioner's witness, Mr. Johns, to enable him to be cross-examined upon this document, but this course was objected to by the Commissioner, and as he would not have been available at the initial hearing for that purpose, (as he was the first witness to be called as a matter of convenience), I was not prepared to allow a lengthy enquiry at this stage if the objectors were unwilling to inform me of the specific issue that it was desired to clarify. I accordingly rejected the document and refused the application to recall Mr. Johns.

The first case stated on the objection of Mr Duncan Holden reads as follows:

[Omitted - See above pp.3 - 9]

In the case stated on the objection of Mr M.C. Menneer the concluding paragraphs 11 (Commissioner's contentions) and 12 are for practical purposes identical in wording with paragraphs 12 and 13 respectively in the Holden appeal as set out above. The factual narrative in the Menneer case is recorded as follows in the case stated:

[Omitted - See above pp.22 - 25]

By way of supplementation of the above narratives, counsel for the Objectors and for the Commissioner are agreed that:

"1. The facts as set out in the two cases stated accurately record the incomes as returned, the assessments made by the Commissioner in each case, and the basis of those assessments. The details relating to the transactions involving the purchase and sale of United Kingdom securities are correctly recorded in the cases stated and in the exhibits accompanying them.

2. The position relating to exchange control during the period in question is accurately and comprehensively described in the evidence of Mr. S.W. Johns.

In the Supreme Court of New Zealand

No.11

Reasons for the Judgment of Haslam J.

7th March 1972 (continued)

3. The courses of action open to New Zealand residents during the period in question who wished to obtain New Zealand currency and had funds in the sterling area are set out in para. 7 of Mr. S.W. Johns evidence-in-chief :

> "7. During the period 1 January 1964 to 16 June 1966 New Zealand residents lawfully possessing funds in the sterling area and wishing to obtain New Zealand currency had three courses of action open to them:
>
> (a) The foreign currency could be remitted to New Zealand through the New Zealand banking system at the official rate of exchange
>
> (b) The foreign currency could be sold to another New Zealand resident provided it was effected at the current official rate of exchange
>
> (c) The foreign currency could be used to purchase foreign assets which were then sold in New Zealand. The most common type of asset was foreign sterling area securities but subject to customs and other requirements the holders of foreign currency could bring other assets such as motor vehicles under the non remittance scheme to New Zealand; and subsequently sell them for New Zealand currency."

4. There is no evidence before the Court as to the existence of a "black-market" for the direct transfer of overseas currency to New Zealand currency, and accordingly there is no suggestion in this case of a commercial rate of exchange based on black market transactions.

5. The evidence establishes that during the relevant period there was a very considerable volume of transactions by way of purchase of sterling area securities for sterling and their sale to New Zealand residents for New Zealand currency. In all of the present transactions the purchase and sale were virtually simultaneous and in each case were concluded on the same day.

6. The objectors contend that the purchase and

sale transactions were simply and essentially a vehicle for the remission of sterling funds to New Zealand funds, while the Commissioner contends that the transactions were commercial transactions producing their own gain.

7. The evidence of Mr Longuet establishes that in the transactions with which he was concerned the price agreed upon between the seller and buyer of sterling securities for New Zealand currency was based on the demand by New Zealand residents for sterling funds. Stockbrokers were able to arrive at a price on any given day in accordance with the usual law of supply and demand.

8. The difference between the amount realised in New Zealand currency following the purchase and sale of sterling securities and the amount obtainable by remitting the sterling to New Zealand through the banking system is, for convenience, referred to as the "premium" on the sterling. The premium obtainable varied over a period of time in accordance with the supply and demand, and also varied according to the particular securities bought and sold. The position is described in the evidence of Professor J.W. Rowe and of Dr. G.A. Lau, but counsel for the Commissioner cannot without abandoning his main argument accept the terminology of "exchange rate" employed by them.

9. The mechanics of the transactions with which Mr. S.G. Longuet was concerned during the period in question involved:

(a) reaching the normal market rate for the United Kingdom securities on any given day;

(b) at the end of the day cabling instructions to his London agents for the purchase and sale of United Kingdom securities;

(c) the debiting of the buyers sterling account with the cost of purchasing the United Kingdom securities; and

(d) the crediting of his New Zealand account with the proceeds of sale of those securities.

The first transaction set out in the Holden case stated may be treated as representative of all the

In the Supreme Court of New Zealand

No.11

Reasons for the Judgment of Haslam J.

7th March 1972 (continued)

transactions in both of the cases stated.

10. Each counsel reserves the right to make limited submissions on the facts."

Both sides agreed that the only factual problem lay in the correct inferences to be drawn from the primary facts as deposed to by the witnesses, and that neither side would be assisted if I were to exceed the narrow limits prescribed by the arguments of counsel. Each reserved the right to raise later such contentions as might be open on the evidence.

The objectors submitted on the strength of the evidence of Professor Rowe in paras. 4, 5, 7, 8 and 9 of his examination-in-chief, and of Dr. Lau para 2. evidence-in-chief and elsewhere, that during the material period there was a legitimate commercial exchange rate (or rates) in New Zealand which differed from the official exchange rate (or rates); that the testimony on this point was relevant to an omission in the material before the Court in the Hunter case, wherein McCarthy J. (pp.128 and 129) made specific reference to the topic; and that on appeal, there was ample material for the Court to draw this inference accordingly. It was conceded that this Court must accept the decision in Hunter's case as binding and as affording a complete answer to the issues raised in the cases stated, and that, although the relevant finding of fact in Hunter's case did not fall within the ambit of binding precedent in the present instance, each taxpayer now before me followed a course so closely approximating the business procedure under review in Hunter's case that it could not be argued that the shares in question were not acquired by the taxpayer "for the purposes of selling" the same property in terms of s.88(1)(c) of the Land and Income Tax Act 1954.

The Commissioner joined issue on the correct interpretation to be placed upon the reasons expressed by McCarthy J. in Hunter's case, and on that aspect I purposely refrain from commenting. He further contended that the majority Judgments in Hunter's case rejected the submission that the constituent elements of transactions in securities could be examined in order to measure the value of

sterling used by the objector in each instance. By way of foreshadowing the main argument to be presented at a later stage, the Commissioner's counsel contended that "the evidence did not establish that, on the day of purchase of any particular parcel of stock the sterling used for that purpose was worth in New Zealand currency a quantifiable sum above its conversion at official exchange rates". I again quote counsel in noting the Commissioner's submission that the quantum of any premium depended to some extent on the particular asset purchased.

The Commissioner also relied upon the evidence given about the conversion of overseas income into New Zealand currency for income tax purposes and the valuation of overseas assets in deceased estates with particular reference to sterling funds. I was referred to the testimony of Mr. Lobb and of Mr Holden about the method employed by his Accountants in calculating for tax purposes the amount of his income earned abroad. In every instance the official exchange rate had been used and that fact may be regarded as unchallenged. I do not think that I can usefully comment at length upon these contending submissions, the result of which in part depends upon the interpretation to be placed on the relevant passage of the testimony.

In this setting it is inappropriate to embark upon a minute examination of the reasons upon which the majority decision was based in Hunter's case. As the Commissioner contended from the outset that the latter decision precluded my reaching any other result, and the objectors (with a reservation of all rights about proceeding further and arguing the matter afresh) agree with this approach by me to the cases stated, I answer "No" to the question as expressed, viz. "whether the Commissioner acted incorrectly".

By consent, and at the invitation of both counsel, I invoke R.34(1) of the Court of Appeal Rules 1955 and direct that no security for costs need be given on either appeal from this Judgment in terms of that Rule. In addition, whatever the ultimate result of this litigation, I fix costs on each case stated at $100, viz. $200 in all, and the incidence of such costs must abide the ultimate event.

Solicitors:
Sainsbury, Logan & Williams, Napier for Objectors.
Crown Law Office, Wellington for Commissioner.

In the Supreme Court of New Zealand

No.12

Formal Judgment of Court (Holden -v- C.I.R.) 7th March 1972

No. 12

FORMAL JUDGMENT OF THE SUPREME COURT (HOLDEN -v- C.I.R.)

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

BETWEEN DUNCAN HOLDEN — Objector

A N D COMMISSIONER OF INLAND REVENUE — Respondent

BEFORE THE HONOURABLE MR JUSTICE HASLAM

Tuesday the 7th day of March 1972

UPON READING the case stated filed herein and UPON HEARING Mr G.P. Barton of Counsel for the Objector and Mr. I.L.M. Richardson and Mr. B.J.A. Cathro of Counsel for the Commissioner of Inland Revenue and the evidence then adduced on behalf of the Objector and of the Commissioner IT IS ORDERED AND ADJUDGED that the Commissioner of Inland Revenue did not act incorrectly in making the assessment of liability of the Objector for income tax on income derived by him during the years ended on 30 June 1965 and 30 June 1966 for income tax purposes referred to in the said case stated and the question in paragraph 13 thereof is hereby accordingly answered "No" AND IT IS FURTHER ORDERED that the costs of and incidental to the case stated be and they hereby are fixed at ONE HUNDRED DOLLARS ($100) the incidence whereof is to abide the ultimate event of the litigation between the parties AND on the application of the Objector IT IS FURTHER ORDERED pursuant to the provisions of Rule 34(1) of the Court of Appeal Rules that due security for costs in the Court of Appeal shall not be required of the Objector upon his bringing an appeal against this judgment to the Court of Appeal.

BY THE COURT

L.S. 'R.B. Twidle'

DEPUTY REGISTRAR

No. 13

FORMAL JUDGMENT OF THE SUPREME COURT (MENNEER -v- C.I.R.)

In the Supreme Court of New Zealand

No.13

Formal Judgment of Court (Menneer -v- C.I.R.) 7th March 1972

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

BETWEEN MAURICE CAMPBELL MENNEER Objector

A N D COMMISSIONER OF INLAND REVENUE Respondent

BEFORE THE HONOURABLE MR JUSTICE HASLAM

Tuesday the 7th day of March 1972

UPON READING the case stated filed herein and UPON HEARING Mr G.P. Barton of Counsel for the Objector and Mr. I.L.M. Richardson and Mr. B.J.A. Cathro of Counsel for the Commissioner of Inland Revenue and the evidence then adduced on behalf of the Objector and of the Commissioner IT IS ORDERED AND ADJUDGED that the Commissioner of Inland Revenue did not act incorrectly in making the assessment of liability of the Objector for income tax on income derived by him during the year ended 31 March 1966 for income tax purposes referred to in the said case stated and the question in paragraph 12 thereof is hereby accordingly answered "No" AND IT IS FURTHER ORDERED that the costs of and incidental to the case stated be and they hereby are fixed at ONE HUNDRED DOLLARS ($100) the incidence whereof is to abide the ultimate event of the litigation between the parties AND on the application of the Objector IT IS FURTHER ORDERED pursuant to the provisions of Rule 34(1) of the Court of Appeal Rules 1955 that due security for costs in the Court of Appeal shall not be required of the Objector upon his bringing an appeal against this judgment to the Court of Appeal

BY THE COURT

L.S. 'R.B. Twidle'

DEPUTY REGISTRAR

In the Court of Appeal of New Zealand

No.14

Notice of Motion on Appeal (Holden -v C.I.R.) 24th March 1972

No. 14

NOTICE OF MOTION ON APPEAL (HOLDEN -v- C.I.R.)

IN THE COURT OF APPEAL OF NEW ZEALAND

No. C.A. 17/72

BETWEEN	DUNCAN HOLDEN	Appellant
A N D	COMMISSIONER OF INLAND REVENUE	Respondent

TAKE NOTICE that this Honourable Court will be moved by Counsel for the abovenamed Appellant on Monday the 10th day of April 1972 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard ON APPEAL by the abovenamed Appellant from the whole of the judgment of the Supreme Court of New Zealand delivered by the Honourable Mr Justice Haslam on 7 March 1972 on a case stated (No. M.285/71, Wellington Registry) under section 32 of the Land and In come Tax Act 1954 wherein the abovenamed Appellant was Objector and the abovenamed Commissioner was Respondent UPON THE GROUNDS that the said judgment is erroneous both in fact and in law and UPON THE FURTHER GROUNDS that the direction and ruling relating to the tendering in evidence of an article relating to "Exchange Control" on pages 79-80 of the Bulletin of the Reserve Bank of New Zealand (volume 29, number 6) was erroneous both in fact and in law.

DATED at Napier this 24th day of March 1972.

'J.H. Zohrab'

Solicitor for the Appellant

TO: The Registrar of the Supreme Court of New Zealand at Wellington

The Registrar of the Court of Appeal of New Zealand

The Respondent and his Solicitor, Mr. B.J.A. Cathro.

In the Court of Appeal of New Zealand

No.15

Notice of Motion on Appeal (Menneer -v- C.I.R.) 24th March 1972

No. 15

NOTICE OF MOTION ON APPEAL(MENNEER -v- C.I.R.)

IN THE COURT OF APPEAL OF NEW ZEALAND

No. C.A. 18/72

BETWEEN MAURICE CAMPBELL MENNEER Appellant

A N D COMMISSIONER OF INLAND REVENUE Respondent

TAKE NOTICE that this Honourable Court will be moved by Counsel for the abovenamed Appellant on Monday the 10th day of April 1972 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard ON APPEAL by the abovenamed Appellant from the whole of the judgment of the Supreme Court of New Zealand delivered by the Honourable Mr Justice Haslam on 7 March 1972 on a case stated (No. M.24/72, Wellington Registry) under section 32 of the Land and Income Tax Act 1954 wherein the abovenamed Appellant was Objector and the abovenamed Commissioner was Respondent UPON THE GROUNDS that the said judgment is erroneous both in fact and in law and UPON THE FURTHER GROUNDS that the direction and ruling relating to the tendering in evidence of an article relating to "Exchange Control" on pages 79-80 of the Bulletin of the Reserve Bank of New Zealand (volume 29, number 6) was erroneous both in fact and in law.

DATED at Napier this 24th day of March 1972.

'J.H. Zohrab'

Solicitor for the Appellant

TO: The Registrar of the Supreme Court of New Zealand at Wellington.

The Registrar of the Court of Appeal of New Zealand

The Respondent and his Solicitor, Mr. B.J.A. Cathro.

In the Court of Appeal of New Zealand

No.16

Reasons for Judgment of Wild C.J. 29th September 1972

No. 16

REASONS FOR JUDGMENT OF CHIEF JUSTICE WILD

IN THE COURT OF APPEAL OF NEW ZEALAND

No. C.A. 17/72

BETWEEN: DUNCAN HOLDEN — Appellant

A N D — COMMISSIONER OF INLAND REVENUE — Respondent

No. C.A. 18/72 A N D

BETWEEN: MAURICE CAMPBELL MENNEER — Appellant

A N D — COMMISSIONER OF INLAND REVENUE — Respondent

Coram: Wild C.J.
Turner P.
Richmond J.

Hearing: 4, 5 September 1972

Counsel: Barton for Appellants
Richardson for Respondents

Judgment: 29/9/72

JUDGMENT OF WILD C.J.

These are two appeals from judgments of Haslam J. given in the Supreme Court at Wellington on 7 March 1972. The two cases have been treated by all concerned as raising identical questions and at all stages they have been heard together.

They turn on the application of s.88(1)(c) of the Land and Income Tax Act 1954 which is as follows:

> "88. Items included in assessable income -
> (1) Without in any way limiting the meaning of the term, the assessable income of any person shall for the purposes of this Act be deemed to include, save so far as express provision is made in this Act to the contrary, - .....

(c) All profits or gains derived from the sale or other disposition of any real or personal property or any interest therein, if the business of the taxpayer comprises dealing in such property, or if the property was acquired for the purpose of selling or otherwise disposing of it, and all profits or gains derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit. "

In the Holden case the Objector became entitled through his father's estate to sterling funds in England. Wishing to bring the money to New Zealand he instructed his sharebroker to take such steps as he thought desirable for that purpose. At the time (and, as was common ground, at all times material to both these appeals) there were three ways in which this could legitimately be done:

(1) the sterling funds could be remitted to New Zealand through the New Zealand banking system at the official rate of exchange;

(2) the sterling funds could be sold to another New Zealand resident at the current official rate of exchange. To convert sterling funds into New Zealand currency at any other rate was illegal;

(3) the sterling funds could be used to purchase foreign assets to be sold in New Zealand for New Zealand currency. The foreign assets most commonly used for the purpose were sterling area securities.

The sharebroker arranged for a number of different purchases of United Kingdom stock to be made on behalf of the Objector and paid for from his sterling funds. In the case of each purchase the stock was on the same day and virtually simultaneously sold in New Zealand for New Zealand currency. In the 1965 income tax year four such transactions were carried through. The sterling expended by the Objector on purchases of stock totalled in amount £4616.15. 0. and the New Zealand currency received on selling the stock amounted to £5168. 7. 6. The Commissioner regarded the difference, £551.12. 6, as a profit under the

In the Court of Appeal of New Zealand

No.16

Reasons for Judgment of Wild C.J. 29th September 1972 (continued)

section mentioned, and assessed the Objector for income tax accordingly. Later the Commissioner took the view that the purchase price in sterling should be recalculated at the official buying rate in New Zealand currency of sterling that prevailed at the relevant date. In consequence he adjusted the profit from £551.12. 6. to £534. 6. 3. and he made a corresponding amendment to the assessment. In the 1966 income tax year eight exactly similar transactions were carried through. Upon these the between the total amount of sterling expended by the Objector and the total amount of New Zealand currency received on selling the stock amounted to £3169.10. 5. When this profit, as the Commissioner regarded it, was adjusted by applying the official buying rate to the sterling in the same manner as earlier mentioned it was reduced to £3077. 0. 4, and the Objector was assessed accordingly.

In the Menneer case the Objector, who had not long since emigrated from England, wished to bring money to New Zealand. He saw his broker and left all arrangements to him. One amount of sterling bonds and three parcels of stock were bought for the Objector with his sterling and, in precisely the same manner as in the Holden case, these were simultaneiously sold in New Zealand for New Zealand currency. The difference between the total amount of sterling expended on the purchases and the total amount of New Zealand currency received on the sales was £1022.10. 6. The Objector was assessed for income tax purposes accordingly. Later the Commissioner made the adjustment previously described by applying the prevailing official buying rate to the sterling, and he amended the assessment to £989.18. 0.

In each of the two cases the Objector objected and asked for a case to be stated, contending that the stock was not acquired for the purposes of sale or disposal and that the respective transactions did not yield any profit or gain within the meaning of the statute. In each case the Commissioner contended that the amount assessed constituted profits derived from the sale of property acquired for the purposes of sale and was also profit derived from the carrying out of a scheme entered into for the purpose of making a profit. In each case the question is whether the Commissioner acted correctly.

From the beginning it was recognised both by the two Objectors (who were represented by the same counsel) and by the Commissioner that the question at issue was over-shadowed by the judgments in this Court in Commissioner of Inland Revenue v. Hunter [1970] N.Z.L.R. 116. When the case came before the Supreme Court the Objectors therefore moved for an order removing it to this Court. This application was at first reserved and then declined by Haslam J. on the ground that the relevant material should be selected from the evidence called. Oral evidence had in the meantime been given by each Objector and on their behalf by a sharebroker, a professor of economics and a business consultant. For the Commissioner there was evidence by a Reserve Bank officer and an investigating officer of the Inland Revenue Department. At the request of the Judge counsel agreed on a statement of facts which was included in the reasons for judgment. This recorded that there was "no evidence as to the existence of a 'black market' for the direct transfer of overseas currency to New Zealand currency, and accordingly there is no suggestion in this case of a commercial rate of exchange based on black market transactions". Haslam J. also recorded counsel's agreement that Hunter's case was binding on the Supreme Court, and that each Objector had so closely followed the procedure reviewed in that case that it was not arguable that the stock was not acquired for the purposes of sale within s.88(1)(c). Having then very briefly mentioned the principal contentions of counsel he gave judgment in each case in favour of the Commissioner.

In Hunter's case there were two questions. The first was whether the stock (bought in circumstances which in all material respects were the same as those in these cases) was "acquired for the purpose of selling or otherwise disposing of it". This Court answered that question unanimously in the affirmative. Counsel agreed that on these appeals the Court is bound by that judgment, though Mr. Barton reserved his right to contest it if the present appeals go beyond this Court. I therefore do not enter on that first question.

The second question in Hunter's case, and the only one in this, was whether the difference between, on the one hand, the amount of New Zealand currency representing at the official buying rate

In the Court of Appeal of New Zealand

No.16

Reasons for Judgment of Wild C.J. 29th September 1972 (continued)

the sterling expended in purchasing the stock and, on the other, the amount of New Zealand currency received on the sale of that stock, was profit properly assessable to income tax. In Hunter's case that question was answered by a majority in favour of the Commissioner. The Objectors on these appeals, however, now contend that when the judgments in the Hunter case are applied to the further evidentiary material produced by them in this case the opposite conclusion must follow. The Commissioner's contention, on the other hand, is that when the judgments in the Hunter case are carefully analysed they are seen to provide authority which must be followed, and that the further evidence makes no difference.

Against that background it is first necessary to examine the judgments in the Hunter case. North P. made his opinion quite clear. For the Objector, he said, it had been contended that, notwithstanding the official rate of exchange, the admitted facts showed that sterling was in fact worth a great deal more than New Zealand currency and, accordingly, in carrying out a transaction of the same nature as those involved in the present appeals, the Objector did not make a profit assessable to tax. But in North P's opinion (p.122) the fundamental error in this was that, in order to secure the additional sum, the Objector had had to engage in a commercial dealing. If the Objector had been able to show that there were persons in New Zealand willing to give a premium for her sterling, it would have been a capital gain and not taxable. But such a course was illegal and in any event had not been followed. As it was, the purchase of English stock and its immediate sale in New Zealand for New Zealand currency resulted in North P's opinion in a taxable profit.

Turner J's opinion was equally clear the other way. What, he asked, was the worth of the English money in New Zealand money? If the official exchange system had been the only channel, or if, there being several legitimately available, that had been the one actually used, it would have shown the value of the sterling in New Zealand money. But the Objector used the Stock Exchange as she was entitled to do and she finished the transaction with no more in New Zealand currency

than anyone could have realised on the available market for the asset with which she began. Therefore there was no profit.

McCarthy J. said that before one could accept that there was a legitimate commercial rate different from the official transfer rate, which should be applied to calculate the result of the transaction, there would need to be adequate evidence of its existence. There was no such evidence, the sole proof being of the transaction in issue which, on its face, seemed to be a commercial transaction producing a profit. The Commissioner had applied the official rate and determined that the Objector had made a profit. It was for the Objector to prove that this was wrong. She had not done so and thus the assessment should be upheld. In effect McCarthy J. seems to me to have left the question open for decision in a future case where there is adequate evidence on which to examine it.

In the result the Commissioner's assessment was sustained in accordance with the judgments of the majority.

On the present appeals it is argued for the Objectors that the evidence now adduced is ample to satisfy McCarthy J's requirement (p.128) that "before one could accept that there was ..... a legitimate commercial rate different from the official transfer rate ..... there would need to be adequate evidence of the existence of such a rate". It is true that there is substantial and uncontroverted evidence to prove a great volume of transactions running into millions of pounds in worth. But these transactions also involved purchases of English and Australian securities which were immediately sold for New Zealand currency. In quantity they are impressive but in nature they appear to me not to be different from the single transaction in the Hunter case or the several in the present appeals. For these reasons I think it is very doubtful whether these transactions do provide the kind of evidence that McCarthy J. had in mind. Counsel for the Commissioner submitted that they do not.

Upon reflection, and bearing in mind the diametrically opposed opinions of North P. and

In the Court of Appeal of New Zealand

No.16

Reasons for Judgment of Wild C.J. 29th September 1972 (continued)

Turner J., I have come to the conclusion that the Hunter case provides no clearly discernible ratio decidendi which must bind the Court in the present appeals. I therefore feel obliged to express my own opinion after consideration of the judgments in the Hunter case and the evidence in these cases.

The amounts of New Zealand currency that the Objectors received from their respective transactions are known. In order to decide whether or not the Objectors derived a profit it is therefore necessary to determine the cost expressed in New Zealand currency of "the property ..... (in this Court admittedly) ..... acquired for the purpose of selling or otherwise disposing of it". In each case and on each transaction the property acquired, namely the stock, was paid for by a sum of sterling held in a bank in England by or on behalf of the Objector. It is therefore a matter of valuing in New Zealand currency that sum of sterling, as distinct from any piece of property that it might be used to purchase, including the stock that it was in fact used to purchase. In my view the only evidence of its value in New Zealand currency as a sum of sterling is the amount of New Zealand currency that the Bank would exchange for it, which depended on the official buying rate at the relevant date. The sum of sterling could not legitimately be acquired for New Zealand currency except at that rate. The Objectors, of course, did not exchange their sums of sterling through a bank for New Zealand currency. Instead they chose, as they were entitled to do, to use them to purchase stock which they immediately sold for a greater sum of New Zealand currency than the Bank would have exchanged for the sums of sterling they used to purchase the stock. In so doing the Objectors must in my opinion be held to have derived a profit from the sale of property acquired for the purpose of selling it.

Upon this reasoning I conclude that the assessments were properly made, and I would answer the questions for the Court by saying that the Commissioner acted correctly.

In accordance with the opinion of the majority the appeals are dismissed. The Commissioner is entitled to one set of costs to be paid by the appellants in such proportions as they may agree.

The costs are fixed at $400 and disbursements.

In the Court of Appeal of New Zealand

No.16

Reasons for Judgment of Wild C.J. 29th September 1972 (continued)

Solicitors for both Appellants: Sainsbury, Logan & Williams, NAPIER.

Solicitors for Respondent: Crown Law Office, WELLINGTON.

No. 17

No.17

Reasons for Judgment of Turner, P. 29th September 1972

REASONS FOR JUDGMENT OF MR. JUSTICE TURNER, President

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 17/72

BETWEEN DUNCAN HOLDEN of Havelock North, Farmer, Appellant

A N D THE COMMISSIONER OF INLAND REVENUE Respondent

A N D C.A. 17/72

BETWEEN MAURICE CAMPBELL MENNEER Appellant

A N D THE COMMISSIONER OF INLAND REVENUE Respondent

Coram: Wild C.J.
Turner P.
Richmond J.

Hearing: September 4th and 5th 1972

Counsel: Barton for Appellants
Richardson and Cathro for Respondent

Judgment: September 29th 1972

JUDGMENT OF TURNER P.

A perusal of the judgments of the members of this Court in Commissioner of Inland Revenue v. Hunter 1970 N.Z.L.R. 116 will show that North P. and I expressed opposite views as to the result which

In the Court of Appeal of New Zealand

No. 17

Reasons for Judgment of Turner, P. 29th September 1972 (continued)

should follow from the transactions in which the taxpayer in that case had engaged. Our different conclusions followed logically from the different pictures which we had severally formed in our minds of the essential nature of those transactions viewed as a whole in their circumstantial context. It could not be doubted that the taxpayer had begun with English funds and had finished with a sum in New Zealand currency. The question was whether the transactions in which he had engaged had resulted in a "profit or gain". Whether there was a profit or gain, and the amount of it, could be ascertained by subtracting from the sum in New Zealand currency with which the transaction ended, the value, measured in New Zealand currency, of the English funds with which he began. North P. felt able to say that the value of the English funds with which he had started was properly to be measured in New Zealand currency by using the official rate of conversion. Notionally converting the initial English funds of the taxpayer into New Zealand currency at this rate, he subtracted this initial sum from the final amount realised, and called the result "profit".

A different concept of the transactions seemed to me to emerge. I thought of the process adopted by the taxpayer as a method available to all New Zealand citizens having funds in England by which they could - and numbers of them every day did - convert their English funds into New Zealand currency at a rate higher than the official rate. There was nothing whatever unlawful about this; it was openly countenanced by the authorities. The result was that those who, having in England English funds which they wished to remit to New Zealand, took sound financial advice, found themselves (almost without being aware of the fact) purchasing Consols in London for telegraphic sale in New Zealand, the result being the instantaneous transmission of their English credit to New Zealand at a rate of exchange considerably better than that availab le through the Reserve Bank. In the result I was of the opinion that the value of the English funds with which the taxpayer began his transactions, measured in New Zealand currency, was in reality no more and no less than the sum with which he ended, and consequently there was no profit or gain.

McCarthy J. agreed in the result with North P.; but his judgment rests at least substantially on his not being able to perceive in the evidence enough to enable him to say that there were two rates of exchange available to taxpayers.

I am prepared to treat Commissioner of Inland Revenue v. Hunter, as suggested by the Chief Justice in the judgment which he has just delivered, as a case in which a ratio decidendi is not discernible sufficiently distinctly to bind this Court in choosing between North P.'s view and my own, and I therefore follow him in expressing my own view, free from the view of North P. and McCarthy J. on the facts in Hunter's case, as to the result which should follow from the facts before us in this one.

I have not changed the view which I expressed in Hunter's case. I do not propose again to develop it in full detail as it appears in the report of that case. Those who wish to follow again the logical steps by which I reached the view which I still hold may read the earlier report. In this case I will merely recapitulate my former reasoning, applying it to the facts before us.

In this case it is necessary for the Commissioner to show a profit or gain on the sale of the Consols. What they realised in New Zealand currency is certain. What is not so certain is what the taxpayer gave for them, measured in New Zealand currency. We know, of course, what he gave for them measured in English currency. To say that the value of this English currency, measured in New Zealand currency, must be its value at the official rate, seems to me entirely to beg the question before us. I think that these English funds in England were worth in New Zealand (as everything else is always worth) what they would bring on the market. If there had been only one market - i.e. only one feasible way of realising them, viz. the official channel, via the Reserve Bank - the question would answer itself. But there were in my opinion two methods of realisation - i.e. two markets - open to the taxpayer. Both were completely legitimate, both were in fact open to the taxpayer, and both were being used daily by large numbers of persons with the open approval of the authorities. These two methods were (a) the official method of remission through the Reserve Bank and (b) the method followed by the taxpayer, and by many other taxpayers, which furnished

In the Court of Appeal of New Zealand

No.17

Reasons for Judgment of Turner, P. 29th September 1972 (continued)

an alternative market for the funds. Where there are two markets and the question is what is the value, the economists tell us that the question is begged by selecting arbitrarily one of the available markets rather than the other. In such case the value is the value in the market actually used, or, if neither is yet used, the value in the higher of them.

In the case before us there is of course more evidence - much more - than there was in Hunter's case, and it is abundantly plain that persons in the position of the taxpayer, having in England English funds which they wished to remit to New Zealand, who put themselves in the hands of a sharebroker with instructions to remit to the best advantage, found themselves almost automatically involved in transactions such as those under consideration in this appeal. As the Chief Justice has recorded in the judgment which he has just delivered, the appellant Holden did no more than "instruct his sharebroker to take such steps as he thought desirable" to remit his English funds to New Zealand; the appellant Menneer "saw his broker and left all arrangements to him". The transactions which followed were those decided by the sharebroker in each case. The purchase and sale of any recognised English security would have given approximately the same result, but Consols were used in the cases before the Court, and were in fact almost universally used in such transactions, for the reason that the appropriate amount could readily be purchased at any time; the brokerage charges were also lower than in the case of other transactions. The official quotation of Consols obtaining on the day of consultation enabled the sharebroker to advise the client to within a matter of shillings just what the transaction would realise at the other end. This evidence seems to me sufficient to meet the difficulty which McCarthy J. found, in Hunter's case, to be an effectual obstacle to the taxpayer's appeal. And in my opinion the picture which emerges is that of the taxpayer receiving, in exchange for his English funds in England, simply what they were worth in New Zealand in New Zealand currency, if the market used by the sharebroker was used by him - no more, no less. No "profit or gain" resulted, for he received only what the English funds, realised in this market, were worth.

It is particularly to be noted that the transactions into which the taxpayer entered constituted a one-way method of remitting funds; it was not possible, having used the process to convert English funds in England to New Zealand currency in New Zealand at a favourable rate, then to remit the funds back to England through banking channels at the official rate and repeat the operation. Had this been possible, no doubt it could have been argued that the English funds were worth, at the beginning, only the sum for which they could have been purchased in New Zealand by this process at the official rate. But it was impossible to remit funds from New Zealand to England through the banking system except with a permit. This was conceded by the Commissioner, and it is perfectly clear from the evidence of Dr Lau at pp.52-3 of his evidence. The regulations prohibited the remission of funds from New Zealand to England except with the permission of the Reserve Bank, and this permission was in fact strictly confined to the financing of licensed import transactions. It was this fact, of course, which produced the (perfectly legitimate) premium rate of realisation which was available to appellants in the transactions b efore us.

If the other members of the Court had been of the opinion that a clear ratio decidendi was discernible in Commissioner of Inland Revenue v. Hunter, and that this ratio decidendi constrained them to follow that decision, I would have been content merely to say that while I still accepted the logic of the train of reasoning which I used in that case, I would defer nevertheless to the decision, in it, of the majority of this Court; but since my brothers have found themselves able to decide this case on principle, not constrained by anything that was said in Commissioner of Inland Revenue v. Hunter, I shall do the same. I express my opinion accordingly that in this case the transactions in which the taxpayers engaged resulted in no profit or gain and that these appeals should succeed.

Solicitors for both Appellants: Sainsbury, Logan & Williams, NAPIER.

Solicitors for Respondent: Crown Law Office, WELLINGTON.

In the Court of Appeal of New Zealand

No.18

Reasons for Judgment of Richmond J. 29th September 1972

No. 18

REASONS FOR JUDGMENT OF MR JUSTICE RICHMOND

IN THE COURT OF APPEAL OF NEW ZEALAND — C.A. 17/72

BETWEEN DUNCAN HOLDEN — Appellant

A N D COMMISSIONER OF INLAND REVENUE — Respondent

A N D

C.A. 18/72

BETWEEN MAURICE CAMPBELL MENNEER — Appellant

A N D COMMISSIONER OF INLAND REVENUE — Respondent

Coram: Wild C.J.
Turner P.
Richmond J.

Hearing: 4 and 5 September 1972

Counsel: Barton for Appellants
Richardson and Cathro for Respondent

Judgment: 29 September 1972

JUDGMENT OF RICHMOND J.

The two questions which were involved in Commissioner of Inland Revenue v. Hunter 1970 N.Z.L.R. 116, and which are also involved in the present appeals, have already been referred to by the Chief Justice. As regards the first of those questions it is common ground that the ratio decidendi is binding on us and I accordingly approach the present appeals on the basis that the United Kingdom stock which was purchased and sold by the appellants was "acquired for the purpose of selling" within the meaning of s.88(1)(c) of the Land and In come Tax Act 1954. As regards the second question I am in agreement with the other members of the Court that a ratio decidendi is not sufficiently discernible to bind the Court in deciding the present appeals.

We now have a considerable volume of evidence of a kind which was not before the Court in Hunter's case. That evidence establishes that in the two financial years dealt with in the cases stated, there was a very substantial volume of dealings similar to those engaged in by the appellants. It also establishes that there were many persons in New Zealand who were prepared to pay more in New Zealand currency for the purchase of United Kingdom stock (in order to acquire sterling funds through the sale of that stock in the United Kingdom) than they would have been required to pay at the official rate of exchange to obtain an equivalent amount of sterling.

In a broad sense therefore it may be said that sterling was at that time worth more in a commercial sense than the value indicated by the official rate of exchange. However the vital question seems to me to be this. Can one properly go one extra step and say that the particular sterling funds owned by the appellants were, as such, worth more than their value at the official rate? There is no doubt that they carried with them the potential of eventually realising a larger figure in New Zealand currency if they were utilised in the purchase of United Kingdom stock. There can also be no doubt that United Kingdom stock commanded a particular value to persons able to purchase it for New Zealand currency. As I see it however, the particular funds owned by the appellants (prior to their investment in United Kingdom stock) commanded no special value in themselves to any New Zealander anxious to acquire sterling. As such they were inaccessible to such a person except at the official rate of exchange or in breach of the Regulations. He would become interested in those funds only when they were invested in stock and the stock was available for sale in return for New Zealand currency. I find great difficulty in the notion of attributing to a particular fund of money a different value according to the way in which that fund of money is subsequently employed. While I have considerable sympathy for the argument advanced on behalf of the appellants, I can find no escape from the view which found favour with North P. in the Hunter case. In essence, I think that it was United Kingdom stock which acquired a special value from the point of view of New Zealand residents anxious to obtain sterling funds and that the premium which was paid for such stock cannot be

In the Court of Appeal of New Zealand

No.18

Reasons for Judgment of Richmond J. 29th September 1972 (continued)

translated into a "commercial" rate of exchange applicable to sterling funds not yet so invested.

For the foregoing reasons I would dismiss the appeal.

Solicitors for the Appellants:	Messrs. Sainsbury, Logan and Williams, Napier.
Solicitor for Respondent:	Crown Law Office, Wellington.

Memorandum submitted by consent

MEMORANDUM SUBMITTED BY CONSENT TO THE COURT OF APPEAL BY COUNSEL FOR THE APPELLANTS

IN THE COURT OF APPEAL OF NEW ZEALAND No.C.A.17/72

BETWEEN	DUNCAN HOLDEN	Appellant
A N D	COMMISSIONER OF INLAND REVENUE	Respondent

A N D

BETWEEN	MAURICE CAMPBELL MENNEER	Appellant
A N D	COMMISSIONER OF INLAND REVENUE	Respondent

A. It is accepted that the following statements appearing in the Bulletin of the Reserve Bank of New Zealand (Vol.29, No.6) for July 1966 were regarded by Professor Rowe as correct:

(1) It was thus possible for New Zealand residents to obtain overseas funds through share transactions with other New Zealand residents and transfers of funds to New Zealand also took place through this type of transaction.

(2) Sharebrokers, solicitors, and accountants in New Zealand, Australia and the United Kingdom were aware of the premium available and would advise intending immigrants and other holders of sterling to transfer funds through the

security market rather than through the banking system.

(3) ... the proceeds from the sale of overseas securities, interest and dividends on overseas securities, immigrants' funds and legacies could either be retained overseas or transferred to New Zealand through a security transaction. The banking system was used to only a moderate extent for such transfers because of the premium to be obtained on the security market.

(4) It should be remembered that all sales of sterling securities in the free market in exchange for New Zealand currency represent the transfer of a New Zealander's overseas assets into New Zealand currency, but without benefit to the official reserves.

(5) The effect of the amendment (S.R. 1966/98) may be summarised as follows:

(a) Sterling area shares will no longer be quoted in New Zealand currency on the New Zealand Stock Exchanges.

B. The parties agree:

"That at all material times it was the policy but not the invariable practice of the Reserve Bank of New Zealand to refuse its consent to the transfer from New Zealand through banking channels of funds brought into New Zealand in this fashion and to insist if the owner required them to be converted into overseas currency that they, or their equivalent in New Zealand currency, be transferred overseas in the same manner in which they were brought into New Zealand."

In the Court of Appeal of New Zealand

No.19

Formal Judgment of the Court of Appeal 29th September 1972

No. 19

JUDGMENT OF THE COURT OF APPEAL OF NEW ZEALAND

IN THE COURT OF APPEAL OF NEW ZEALAND No. C.A.17/72

BETWEEN DUNCAN HOLDEN Appellant

A N D COMMISSIONER OF INLAND REVENUE Respondent

A N D C.A. 18/72

BETWEEN MAURICE CAMPBELL MENNEER Appellant

A N D COMMISSIONER OF INLAND REVENUE Respondent

BEFORE

THE RIGHT HONOURABLE THE CHIEF JUSTICE (Presiding)
THE RIGHT HONOURABLE MR JUSTICE TURNER
THE HONOURABLE MR JUSTICE RICHMOND

Friday the 29th day of September 1972

THESE Appeals coming on for hearing on the 4th and 5th days of November 1972 AND UPON HEARING Mr Barton of Counsel for the Appellants and Mr Richardson and Mr Cathro of Counsel for the Respondent THIS COURT HEREBY ORDERS that the Appeals be and the same are hereby dismissed with costs of $400 to the Respondent together with the Respondent's disbursements of $3.40 as per the attached schedule.

BY THE COURT

L.S.

Deputy Registrar.

In the Court of Appeal of New Zealand

No.20

Order of Court of Appeal giving final Leave to Appeal to Her Majesty in Council 2nd April 1973

No. 20

ORDER OF COURT OF APPEAL GIVING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE COURT OF APPEAL OF NEW ZEALAND No. C.A.17/72

BETWEEN DUNCAN HOLDEN Appellant

A N D COMMISSIONER OF INLAND REVENUE Respondent

AND No. C.A. 18/72

BETWEEN MAURICE CAMPBELL MENNEER Appellant

A N D COMMISSIONER OF INLAND REVENUE Respondent

BEFORE

THE RIGHT HONOURABLE MR JUSTICE TURNER (Presiding)
THE RIGHT HONOURABLE MR JUSTICE McCARTHY
THE HONOURABLE MR JUSTICE RICHMOND

UPON READING the Notice of Motion filed herein and the affidavit of John Renwick Harkness sworn and filed in support thereof AND UPON HEARING Mr Barton of Counsel for the Appellant and Mr Neazor of Counsel for the Respondent THIS COURT DOTH ORDER that the Appellants do have final leave to appeal to Her Majesty in Council from the Judgment of this Honourable Court pronounced herein on the 29th day of September 1972.

BY THE COURT

L.S.

.....
Deputy Registrar.

IN THE PRIVY COUNCIL No. 13 of 1973

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :-

DUNCAN HOLDEN — Appellant

-and-

COMMISSIONER OF INLAND REVENUE — Respondent

AND BETWEEN :-

MAURICE CAMPBELL MENNEER — Appellant

-and-

COMMISSIONER OF INLAND REVENUE — Respondent

RECORD OF PROCEEDINGS

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Solicitors for the
Respondent.